

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs November 3, 2015 Session

MELINDA KATHLEEN NICHOLS LONG v. LIONEL EDSON LONG

**Direct Appeal from the Circuit Court for Rutherford County
No. 67619 Royce Taylor, Judge**

No. M2015-00592-COA-R3-CV – Filed December 29, 2015

Appellant filed a petition to modify alimony and child support. During the hearing on the petition, the trial court modified an award of separate property. Because the trial court issued a judgment outside of the relief requested by the parties, we reverse and vacate.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in part, Vacated in part, and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JOHN W. MCCLARTY, J., joined.

David L. Scott, Murfreesboro, Tennessee, for the appellant, Lionel Edson Long.

Melinda Kathleen Nichols-Long, Appellee.¹

OPINION

Melinda Kathleen Nichols-Long (“Wife” or “Mother”) and Appellant Lionel Edson Long (“Husband” or “Father”) divorced in Georgia in 2011. The Georgia Final Judgment and Decree awarded Wife a car, a home in Columbus, Georgia, and provided that

[Wife] is awarded as her separate property a percentage of the Defendant’s disposable military retired pay to include any lump sum payments, benefits, or cost of living adjustments (COLA), to be computed by multiplying 30% times member’s disposable military retired pay. Disposable retired pay shall be defined pursuant to 10 U.S.C. § 1408(a)(4).

¹Appellee did not file a brief.

In a separate section of the Final Judgment and Decree, Husband was ordered to pay alimony to Wife in the amount of \$1,422 per month. Husband's alimony obligation began on August 1, 2010 and was to continue for six years or until the Wife's re-marriage or the death of either the Husband or the Wife.

In October 2013, Husband filed a Motion for Modification of Child Support and Alimony in Georgia. This motion asserted that Husband was unemployed and retired from the United States Army due to medical disability. The motion sought only a change in alimony and child support due to Husband's retirement and resulting decrease in income. Wife filed a motion to dismiss the motion, asserting that she no longer lived in Georgia. In January 2014, the Georgia court entered a consent order to transfer the case to Tennessee. This order indicated that Husband lived in Florida and that Wife lived in Murfreesboro, Tennessee. At the time of these filings, the parties had one minor child who was also residing in Murfreesboro.

In February 2014, Husband filed an Amended Petition to Modify Residential Parenting Schedule and to Modify Alimony in Rutherford County, Tennessee. In this petition, Husband alleged, among other things, the following:

[Wife/Mother] moved from Columbus, Georgia to Murfreesboro, Tennessee in May 2013, and the minor child moved subsequently thereafter. Father has learned Mother is now residing with her sister and brother-in-law in Murfreesboro, Tennessee, and the minor child has been residing in Murfreesboro with her boyfriend and his parents.

....

Father would show he is currently unemployed and is retired from the United States Army due to a medical disability. He is now able to care for the minor child as the primary residential parent.

....

Father would show the Final Judgment and Decree listed Father's imputed gross monthly income as \$8,312.00 in 2010, and currently this monthly income has decreased to \$4,751.00. Father's child support obligation as ordered by the Final Judgment and Decree is \$1,010.00 per month.

....

Father would also show, pursuant to the Final Judgment and Decree, Mother is awarded thirty percent (30%) of Father's disposable military retirement pay, as well as alimony in the sum of \$1,422 per month since August 2010 for her support and maintenance.

In his prayer for relief, Husband prayed for a change in the primary residential parent designation, modification of the residential parenting schedule, a child support

modification, and a modification of alimony owed to Wife “from \$1,422.00 per month to \$0 per month due to a substantial and material change in circumstances.”

In May 2014, the Rutherford County Circuit Court granted temporary custody of the parties’ minor child to Husband and modified the child support award. The court reserved the alimony modification and permanent residential schedule for a later date. On June 2, 2014, Wife filed a Petition for Contempt, alleging that Husband had failed to pay child support and alimony.

The trial court scheduled a hearing on September 29, 2014. At the hearing, Husband’s counsel noted that the issues to be resolved by the court were only the modification of alimony and child support. After Husband’s direct examination, the following exchange transpired:

COURT: Now, as I understood the testimony here – and we haven’t had cross, but I haven’t heard anything about any payments of 30 percent of his retired pay yet.

[HUSBAND’S COUNSEL]: Judge, I don’t believe that is modifiable. Correct me if I am wrong.

COURT: I don’t see any payments going out for that. How is that getting paid?

WIFE: It’s not.

WIFE’S COUNSEL: May I address that, Judge.

COURT: Yes.

WIFE’S COUNSEL: Judge, we intended to deal with that on cross, but if I’m not mistaken, she won’t get any of that because when he retired from the military under a disability style retirement, she’s no longer entitled to that 30 percent of that retirement pay.

COURT: Oh, yes, she is. He’s still retired, whether it’s medical retirement or whatever. They may not give it to her, but she’s entitled to it. They may not give it to her by apportion, but she’s still entitled to it. As I look at this, she’s got the retired pay between military retirement and VA waiver, which is a waiver that just makes his retirement not taxable. He’s got \$4,317.58 in disposable income times 30 percent is \$1,295.97. I don’t

think that's modifiable.

HUSBAND'S COUNSEL: I don't believe so either. I will check back at the final.

During the hearing, Wife testified that she had not submitted paperwork to DFAS (Defense Finance and Accounting Service) requesting her thirty percent of Husband's retirement.

In its oral ruling from the bench, the trial court determined that Husband's retirement from the Army constituted a change of circumstances and required re-calculation of child support and alimony. The court went on to say:

Now, with regard to alimony, again, I think that under the divorce decree it was anticipated there would be transitional alimony without any determination of when the retirement would be.

Once the retirement starts, I think that the alimony terminates. It is not required to terminate, but I think under the circumstances it terminates because she is now getting 30 percent of his disposable retirement pay, so I'm going to terminate the alimony beginning as of November of 2013.

Under the retirement, she is entitled to 30 percent. I calculated 30 percent of his net and, of course, DFAS may do this differently. I don't know exactly how they do it, but I took the [\$]3,240.65 that was on his pay statement minus the [\$]89.07 for taxes. And I got his net at [\$]3,151.58 times 30 percent is [\$]945.47, so I am going to set that amount until DFAS sets another amount when you send this Order in.

In addition to that, she is entitled to 30 percent of the retirement that is deferred to the VA of \$1,166; 30 percent of that is \$349.80.

After Husband's attorney requested the court clarify the thirty percent of Husband's disability pay, the court stated:

.... 30 percent of the net military pay, and then 30 percent of the deferred pay that goes to the VA.

The VA won't allow you to get that. That is what's always an issue with these is the VA will not – since it's in the nature of disability pay, they will not pay a percentage to spouse, but the Court can order it to be paid to the

spouse.

So it will be under a Court Order that it be paid to the spouse, that 30 percent of the VA amount.

In October 2014, the trial court entered a written order, noting that Husband's "Amended Petition to Modify Alimony and Mother's Petition for Contempt" were the only contested issues before the court. The court found that the Husband's retirement from the United States Army was a material change of circumstances and required the recalculation of both child support and alimony. The court therefore reduced Husband's child support obligation to \$707 per month from October 28, 2013 to the end of April 2014 and further determined that Wife must pay Husband child support of \$340 per month beginning in May 2014. The court also terminated Husband's spousal support, beginning in November 2013, the commencement of Father's retirement.

The court went on to say:

Pursuant to the Final Judgment and Decree, [Wife] is entitled to receive thirty (30) percent of [Husband's] disposable military retirement pay. The Court calculates the award based upon \$3,240.65, the taxable income reflected on Father's pay stub, minus \$89.07 for taxes, equaling a net pay of \$3,151.58. The Court computes the total amount of benefits by multiplying thirty (30) percent of \$3,151.58, and obtaining \$945.47. In addition, the Court finds [Wife] is entitled to thirty (30) percent of [Husband's] VA disability compensation, which totals \$349.80. The sum of monthly retirement benefits provided to [Wife] is \$1,295.27. The Court finds Mother should have received an award of \$1,295.27 for the past eleven months. The Court grants [Wife] a judgment in the amount of \$14,247.97.

Pending a thirty (30) percent garnishment of [Husband's] disposable military retired pay from DFAS, [Wife] is currently receiving a garnishment in the amount of \$690.00. The Court finds \$605.27 should be paid directly to [Wife] to satisfy the total balance of \$1,295.27. Once DFAS begins garnishing the amount of \$945.47 for Mother's percentage of military retirement benefits, Father is still under an obligation to directly pay \$349.80 for Mother's portion of his VA disability compensation. The Court finds Mother should receive approximately \$1,300 per month in retirement benefits.

These findings of the trial court are the only issues on appeal.

Issue on Appeal

Appellant's only issue on appeal, as we have restated it, is whether the trial court erred in ordering Appellant to pay thirty percent of his retirement disability pay to Wife.

Standard of Review

Appellant's issue on appeal involves only a question of law. Regarding issues involving questions of law, our standard of review is de novo with no presumption of correctness or deference to the legal conclusions made by the trial court. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

Analysis

Husband first argues that the trial court erred in ordering him to pay Wife a portion of his disposable military retired pay because that issue was not properly before the court. He further argues that the trial court improperly expanded the definition of "disposable military retired pay."

A judgment or a decree that is beyond the fair scope of the pleadings is void. *Brown v. Brown*, 198 Tenn. 600, 611, 281 S.W.2d 492, 497 (1955). The policy underpinning this rule is that "since the purpose of pleadings is to give notice to all concerned regarding what may be adjudicated, a judgment beyond the scope of the pleadings is beyond the notice given the parties and thus should not be enforced." *Id.* at 497. Without such notice, a party is at a disadvantage in preparing for trial. A court cannot create a claim where none exists. *Baxter Bailey Investments LLC v. APL Ltd. Inc.*, No. W2015-00067-COA-R3-CV, 2015 WL 5560563, at *10 (Tenn. Ct. App. Sept. 21, 2015). "A trial court commits error when it bases a decision, even in part, upon conclusions concerning an issue that was not raised in the pleadings or tried by consent," and "[j]udgments awarded outside of the scope of the requested relief are typically void." *Id.* (internal citations omitted).

In this case, Husband filed a petition that sought only to modify alimony and child support. Since the case has been pending in Tennessee, Wife only pursued civil contempt against Husband for failure to pay alimony and child support. Neither party raised an issue regarding Wife's separate property share of Husband's military retirement. Granted, Husband's post-retirement income was a factor to consider in the alimony and child support modification, but Wife never asked the trial court to resolve an issue regarding her separate property share of Husband's military retirement. Instead, the trial court created a claim where none existed. Given that the trial court's judgment with

respect to Wife's thirty percent share of Husband's retired military income was outside the scope of the requested relief, we must reverse the trial court's judgment in this regard, vacate the trial court's rulings with regard to the calculation of disposable military retired pay, and vacate the trial court's judgment for arrears for disposable military retired pay.

Conclusion

For these reasons, the judgment of the trial court is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to Appellee, Melinda Kathleen Nichols Long, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE