

RENDERED: MAY 22, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NOS. 2017-CA-000511-MR AND
2017-CA-000970-MR

ANTHONY T. SCIONTI, JR.

APPELLANT

v. APPEALS FROM HARDIN FAMILY COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 98-CI-00676

JACKIE SCIONTI (NOW ANDERSON)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, K. THOMPSON, AND L. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Anthony T. Scionti, Jr. appeals from the January 20, 2017 orders of the Hardin Family Court granting Jackie Scionti (now Anderson) (Anthony's former wife) 26% of Anthony's military retirement and the February 20, 2017 order denying Anthony's motion to alter, amend, or vacate.

Anthony was a member of the United States military. He enlisted in the reserves on July 9, 1985 and went to active duty in April 1990. He retired from active duty in February 2013.¹

Anthony and Jackie married in 1988 and their marriage was dissolved in 1998. In the judgment and decree of dissolution the circuit court incorporated the parties' separation agreement which provided that, pursuant to *Poe v. Poe*, 711 S.W.2d 849 (Ky.App. 1986), Jackie's share of Anthony's military retirement benefits shall be computed as follows:

* $\frac{\text{months (duration of marriage)}}{\text{total months of military service}} = \%$ of future monthly retirement payments which were earned during the marriage

<p>% of future monthly retirement payments earned during the marriage</p>	<p>X</p>	<p>1/2 of [Anthony's] disposable retired or retainer pay (as defined in 10 U.S.C.^[2] Section 140 8(c)(1)),</p> <p style="text-align: center;"><u>OR</u></p> <p>1/2 of the disposable retired or retainer pay which would be payable to [Anthony] if he retired at the same rank and basic pay rate which [Anthony] had attained as of the (date of judgment)</p>	<p>X</p>	<p>that portion of any post-retirement cost-of-living increases (10 U.S.C. Section 140(a)) which are proportional to [Anthony's] interest in this disposable retired or retainer pay computed as of the date of retirement.</p>
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WHICHEVER IS LESS.

¹ Anthony and Jackie disagree on the exact date of Anthony's retirement in February 2013.

² United States Code.

This computation was very similar to that used by the lower court in *Poe*, 711 S.W.2d at 851.

In 2016, Jackie filed for a post-decree hearing to receive her share of Anthony's military retirement benefits. Anthony failed to appear at the hearing. The hearing was reset to January 9, 2017 at 1:30 p.m.³ Anthony failed to appear at the second hearing.

On January 20, 2017, an order and a military retired pay division order were entered. The family court awarded Jackie 26% of Anthony's disposable retired pay plus 26% of his future cost-of-living adjustments (COLA).

Anthony filed a motion to alter, amend, or vacate. He explained that he believed the retirement calculations were incorrect and requested a hearing to calculate the correct percentage due Jackie. Anthony filed an affidavit stating he believed the hearing was scheduled for January 10, 2017; he arrived at court that day and learned that the hearing was held on the prior day.

Jackie opposed the motion, arguing Anthony had not established excusable neglect and stating that based on counsel's calculations, Jackie was entitled to 22% of Anthony's retirement, which was "close to the amount in the Court's Order." Jackie requested attorney fees.

³ The parties did not request that the DVD of that hearing be part of the record on appeal.

After a hearing on February 14, 2017, the family court summarily denied Anthony's motion in an order entered on February 20, 2017. Anthony appealed.

On March 15, 2017, Anthony filed a new motion specifically arguing that the 26% award was not supported by the evidence and there was no listing of Anthony's credible years of military service to determine this calculation. Anthony requested more specific findings and stated he was entitled to relief under Kentucky Rules of Civil Procedure (CR) 52.03 because the evidence did not support the family court's findings. Anthony filed a supportive affidavit stating that he could not determine how the family court calculated the 26%.

The family court denied Anthony's motion in an order entered on April 27, 2017. Anthony appealed. These consolidated cases were delayed from being heard before this Court because of various procedural steps taken to attempt to facilitate settlement and the parties' own motions.⁴

⁴ Anthony delayed both cases by asking for additional time to file his prehearing statements. He was granted this additional time. Then these cases were determined to be appropriate for a prehearing conference to possibly settle the cases and two prehearing conferences were held, but no settlement was ultimately reached. Anthony then caused a second delay by requesting additional time to file his appellate brief. This motion was granted and after his brief was filed Jackie caused a delay when her counsel asked to withdraw. Anthony was given time to respond and after the motion was granted the cases were abated to allow Jackie time to find new counsel and then she was granted additional time to file an appellate brief. It was only after this time lapsed that the cases were finally assigned to the merits panel.

Anthony argues that the family court erred by: (1) awarding 26% of Anthony's retirement plus 26% of his COLA to Jackie; (2) denying him a new hearing to correct the calculations; and (3) failing to draft its own orders. On appeal, Jackie is *pro se* and did not file a brief.

Anthony calculates that the retirement due Jackie is 21.38%. He reaches this conclusion based upon the parties being married for 124 months and 24 days and Anthony having 290 months of service (from serving 278 months of military service with 372 reserve points, which is then divided by 360 to give him an additional 12 months of service). He applies the *Poe* formula by dividing 124 months of marriage by 290 months of military service, multiplied by one half to get Jackie's share. Anthony argues that the family court abused its discretion by upholding a finding of 26% when Jackie is not entitled to have any of the non-marital portion of Anthony's retirement and asks that we reverse and remand for appropriate calculations. Anthony argues he is entitled to a new hearing pursuant to CR 59.01(d), (e), and (f) because the damages were excessive and not supported by sufficient evidence. Anthony also argues that the family court erred by adopting Jackie's calculations where they were not supported by the record.

Poe allows for an award of a nonvested pension as marital property under the following conditions. The only portion of the pension which can be awarded is that which represents the other spouse's marital contribution as

permitted by federal law. Any award is contingent upon the earning spouse being entitled to those benefits and requires that the court be “willing to delay the actual division of those benefits until they are capable of distribution and have in every sense of the word ‘vested.’” *Poe*, 711 S.W.2d at 856.

Anthony acknowledges that Jackie is entitled to her share of his military retirement. He is correct that it is not appropriate for Jackie to be granted more than her fair share in accordance with the formula contained in their settlement agreement and that he is entitled to receive factual findings demonstrating how the family court arrived at its division. We, too, are unable to determine how the family court arrived at its determination that Jackie was entitled to 26% of Anthony’s military retirement.

Jackie did not file a brief, but we believe if she had, she would reiterate her earlier response to Anthony’s motion, that Anthony did not show excusable neglect in failing to attend the hearing, acknowledge that an incorrect calculation was made and that she was entitled to 22% of his retirement and not 26%, but request that she be allowed to retain the excess retirement because it was close to the family court’s calculation. While Anthony’s failure to attend the hearing and filing of motions which required additional cost to Jackie could appropriately result in attorney fees for Jackie, it could not result in the retention of an inappropriate award.

The parties divided their marital property in the way that they thought was just in their settlement agreement, including providing that the marital proportion of Anthony's military retirement would be divided equally. If the family court awarded Jackie more than half of the marital portion of Anthony's retirement after the fact, it would make the overall division of marital property unjust. *See Snodgrass v. Snodgrass*, 297 S.W.3d 878, 888 (Ky.App. 2009)

Pursuant to CR 76.12(8)(c):

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

We reverse the judgment pursuant to (ii) and (iii). As to (ii), Anthony established there was a lack of explanation and factual findings necessary to divide his military retirement and, thus, his brief reasonably appears to sustain such an action. As to (iii), we regard Jackie's failure to file a brief as a confession (consistent with her earlier response below) that there was an error in the percentage of military retirement awarded to her.

Therefore, we reverse and remand the orders awarding Jackie 26% of Anthony's retirement for the family court to hold a new hearing where the parties can present evidence so that the family court may properly make appropriate

findings in accordance with the formula that Anthony and Jackie agreed would govern this division.

ALL CONCUR.

BRIEF FOR APPELLANT:

T. Renee McMahan
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

No brief filed.