

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0885

September Term, 2015

RICKY H. GUYTON

v.

LOVIE YVETTE GUYTON

Kehoe,
Friedman,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: May 19, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case presents the latest installment in a series of cases concerning the distribution of military retirement and disability benefits in divorce.

FACTS

Ricky and Lovie Guyton were married in 1979. They were granted an absolute divorce by the Circuit Court for Anne Arundel County in December of 2013.

MOTION TO DISMISS

Before we turn to the merits of the appeal, we first consider Lovie’s motion to dismiss. She raises two grounds in her motion: *first*, that Ricky’s appeal was not filed timely; and *second*, that Ricky failed to comply with the rules governing the production of a record extract.

Maryland Rule 8-202(a) requires that a “notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken.” This Rule is considered jurisdictional and may not be waived. *Griffin v. Lindsey*, 444 Md. 278, 285-86 (2015) (citing *Houghton v. County Comm’rs of Kent Co.*, 305 Md. 407, 413 (1986) (holding that “if the requirement [of Rule 8-202(a)] is not met, the appellate court acquires no jurisdiction and the appeal must be dismissed.”)). The question here is from what date the 30 days is calculated. There are at least five plausible choices recommended by the parties:

- *First*, the time to appeal might have started on December 27, 2013, the day on which the clerk of court docketed the judgment of divorce after a two-day hearing in the Circuit Court for Anne Arundel County (Kiessling, J.). It turns out, however, that this could not have been the trigger for counting the 30-day period, because the Constituted Pension Order was anticipated to be a part of the judgment and had not been completed by that date. *See Rohrbeck v. Rohrbeck*, 318 Md. 28, 43-44 (1989) (holding that the trial court’s judgment

was final only when, as the trial court intended, individual Qualified Domestic Relations Orders (“QDRO”) were signed); *Jenkins v. Jenkins*, 112 Md. App. 390, 399-400 (1996) (QDRO or Constituted Pension Order may be integral to final judgment);

- *Second*, the time to appeal might have started on September 23, 2014, the day on which the clerk docketed the decision of the three-judge panel (Harris, Caroom, and Mulford, JJ.). It turns out, however, that this could not have been the trigger for counting the 30-day period, because the anticipated Constituted Pension Order had not been finalized by this date. *See Rohrbeck, supra; Jenkins, supra*;
- *Third*, the time to appeal might have started on November 13, 2014, the day on which the clerk docketed the Circuit Court for Anne Arundel County’s first order (Asti, J.) requiring Ricky to sign the Constituted Pension Order prepared by Lovie’s counsel. At that point, however, there wasn’t a final judgment yet and, more importantly, the offending provision¹ of the Constituted Pension Order was not yet a part of the judgment;
- *Fourth*, the time to appeal might have started on December 11, 2014, the day on which the clerk docketed the Circuit Court for Anne Arundel County’s second order (Mulford, J.) ordering (1) Ricky to sign the Constituted Pension Order prepared by Lovie’s counsel, and (2) “that if [Ricky] fail[ed] to sign the [Constituted Pension Order], the Court [would] accept the [Constituted Pension Order] as drafted.” At that point, however, there wasn’t a final judgment yet as the court had only promised in the future to effectuate the order, and, the offending provision of the Constituted Pension Order was not yet a part of the judgment; and
- Finally, *fifth*, the time to appeal might have started on June 17, 2015, the day on which the signed Constituted Pension Order was docketed and the completed judgment entered on the record.

¹ What we have labelled the “offending provision” may be found in the second half of ¶14 of the Constituted Pension Order dated June 15, 2014. That provision states: “nor shall the Member [who is elsewhere defined as Ricky Guyton] waive his military retirement benefits for the purpose of increasing or receiving any other retirement or annuity plan in which he may participate or be eligible to participate or for the purpose of receiving disability pay.”

As must be clear, we think that the proper trigger date was June 17, 2015. It was only as of that date that there was a final appealable judgment. Because Ricky’s appeal was filed on July 8, 2015, which was within 30 days of this trigger date, his appeal was timely. As a result, we will deny Lovie’s motion to dismiss on this ground.

Lovie’s second complaint is that Ricky failed to identify which documents to put in the record extract and failed to put relevant documents into the extract. These failures constitute a violation of Maryland Rule 8-501 and as a result, Lovie argues that we should dismiss Ricky’s appeal. Because this case arises from Anne Arundel County, the pilot county for the MDEC² system, and, as a result, all documents are available to us electronically, we reluctantly exercise our discretion to accept the record extract as filed, despite its failure to comply with the Rule. We therefore deny the motion to dismiss the appeal on this basis. We caution counsel, however, that while failure to properly construct a record extract annoys opposing counsel, it may prejudice the Court.

² The Maryland Electronic Courts (“MDEC”) system creates a single Judiciary-wide integrated case management system that will be used by all the courts in the State court system. *See generally* Maryland Rules, Title 20, Electronic Filing and Case Management.

ANALYSIS

The sole question on the merits of this appeal is whether the provision of the Constituted Pension Order that precludes Ricky from waiving retirement benefits in favor of disability benefits is legally acceptable.³

The difference between military retirement benefits and disability benefits is important:

The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank achieved. Veterans who became disabled as a result of military service are eligible for disability benefits. The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired.

[T]o prevent double dipping, a military retiree may receive disability benefits only to the extent that he [or she] waives a corresponding amount of his [or her] military retirement pay. Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.

Mansell v. Mansell, 490 U.S. 581, 583-84 (1989) (internal citations and footnotes omitted).

The manner in which these two types of benefits are treated in divorce is also different. In *McCarty v. McCarty*, the United States Supreme Court held that military retirement benefits could not be divided by state courts pursuant to state marital property

³ For the text of the provision, see *supra*, note 1.

laws. 453 U.S. 210 (1981). In direct response to *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act ("USFSPA"), which authorizes the states to treat retirement pay as marital property. 10 U.S.C. § 1408. By contrast, however, military disability pay may not be divided as marital property. 10 U.S.C. § 1408; *Mansell v. Mansell*, 490 U.S. 581 (1989).

In a series of cases beginning with *Dexter v. Dexter*, 105 Md. App. 678 (1995), including *Allen v. Allen*, 178 Md. App. 145 (2008), and most recently *Wilson v. Wilson*, 223 Md. App. 599 (2015), *cert. granted*, 445 Md. 19 (2015), and *cert. dismissed as improvidently granted*, 446 Md. 287 (2016), *reconsideration denied* (Mar. 24, 2016), this Court found that state contract law can provide a method to avoid the federal non-divisibility rule. *Dexter*, *Allen*, and *Wilson* all arose in a context in which the military spouse had voluntarily contracted to pay the other spouse a share of retirement benefits and later tried to waive the retirement benefit, accept disability instead, and thereby prevent the non-military spouse from obtaining a share. *Dexter*, 105 Md. App. at 680, 684; *Allen*, 178 Md. App. at 153-54; *Wilson*, 223 Md. App. at 616-17. In each case, we held that the military spouse had voluntarily agreed to pay the non-military spouse a percentage of the retirement benefit and could not then abrogate that contractual obligation merely by converting the retirement to a disability benefit. *Dexter*, 105 Md. App. at 686; *Allen*, 178 Md. App. at 155-56; *Wilson*, 223 Md. App. at 629.

Ricky urges a different result because unlike the voluntary contractual agreements in *Dexter, Allen, and Wilson*, this non-waiver provision was forced on Ricky—over strenuous objection—by the circuit court. Lovie, by contrast, argues that Ricky has waived the right to object.⁴

We think the rule is simpler than either of the parties have argued. It is that the circuit court has the power under the Marital Property Act to equitably divide all marital property and to make all orders necessary to effectuate that distribution. The only limitation to that power relevant here is that, pursuant to federal law, a disability benefit cannot be divided. 10 U.S.C. §1408; *Mansell v. Mansell*, 490 U.S. 581 (1989). Here, however, the Constituted Pension Order does not force a division. Rather, it prevents Ricky from unilaterally creating a situation of non-division. That is not prohibited.⁵

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

⁴ Lovie bases this argument on Ricky’s agreement at trial to “splitting his military retirement pay ... 50/50.” We do not think this statement is as clear a waiver as Lovie does. It could easily be read as an agreement regarding retirement benefits only as opposed to retirement and disability. In any event, this Court retains the discretion, despite argument otherwise, to review unpreserved matters. Md. Rule 8-131(a); *see Jones v. State*, 379 Md. 704, 712-15 (2004).

⁵ If Ricky is or becomes eligible for a disability benefit, the non-waiver provision of the Constituted Pension Order will likely prevent the possibility of reducing tax liability for both parties. To avoid that result, the parties are free to voluntarily modify the Constituted Pension Order along the lines suggested by *Dexter, Allen, and Wilson*.