

Circuit Court for Harford County
Case No. 12-C-14-003254

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1496

September Term, 2016

JASON ROGER STOJKA

v.

JENNIFER LEWIS STOJKA

Graeff,
Leahy,
Beachley,

JJ.

Opinion by Leahy, J.

Filed: November 2, 2017

*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.

Jason Roger Stojka (“Appellant”), a Major in the United States Marine Corps, and Jennifer Lewis Stojka (“Appellee”), filed counter-complaints for absolute divorce in the Circuit Court for Harford County. Prior to trial, they entered into a settlement agreement in which they resolved every issue but the division of Mr. Stojka’s military retirement pay and survivor benefit annuity, which their agreement reserved for the court. The circuit court’s order dividing those benefits reserved continuing jurisdiction in the event that Mr. Stojka does not receive his retirement pay due to non-promotion, his failure to accrue sufficient years of service, or his waiver of those benefits in favor of disability benefits. Mr. Stojka appealed, contesting the circuit court’s authority to do so under Maryland law, federal law, and the parties’ settlement agreement. He presents two questions for our review:

- I. “Did the trial court err by including language in the Judgment of Absolute Divorce that indefinitely reserved jurisdiction over the parties and their personal property in the event that Appellee’s share of Appellant’s Military Retirement Pay is reduced by the Appellant’s waiver of same in favor of disability pay?”
- II. “Did the trial court err when it executed a Judgment of Absolute Divorce that substantially deviated from its oral opinion, including, among other things, failing to include ‘if, as, and when’ language with regard to the division of Appellant’s Military Retirement Pay?”

This is the first case in which we are asked to review a division of marital property in light of our recent decision in *Hurt v. Hurt-Jones*, ___ Md. App. ___, No. 2328, September Term 2014 (filed August 30, 2017). Applying the precepts in *Hurt* as well as the Supreme Court’s decision in *Howell v. Howell*, 137 S. Ct. 1400 (2017), we hold that the circuit court’s authority to retain continuing jurisdiction over the division of marital

property was consistent with Maryland law, but that federal law prohibits it from asserting that jurisdiction to indemnify Ms. Stojka for her interest in Mr. Stojka’s military retirement pay if he waives those benefits in favor of disability benefits. Further, we hold that pursuant to their settlement agreement, the parties waived their right to have a court adjust the equities between them by monetary award or the transfer of ownership interest in any assets or benefits other than Mr. Stojka’s military retirement pay and survivor benefit. We also hold that the circuit court’s award of benefits was consistent with an “if, as, and when” division, despite its failure to use that specific phrase.

BACKGROUND

A. The Marriage and Separation

The parties were married on November 23, 2005, in a civil ceremony in Howard County. During their marriage, they had two children: L.S., born in 2006, and P.S., born in 2008. The parties separated on August 21, 2014.¹

Mr. Stojka filed a complaint for limited divorce on October 20, 2014, in the Circuit Court for Harford County. In the complaint, he asked the court to enter an absolute divorce or, alternatively, a limited divorce, and to award him, *inter alia*, custody of the children as well as child support and continued use of the family-use property for no less than three years. In her answer filed on December 17th, Ms. Stojka requested the court to deny the relief requested and dismiss the complaint. Then, on January 26, 2015, Ms. Stojka filed a

¹ The court’s oral ruling listed the date of separation as June 23, 2014. This was the date suggested in Mr. Stojka’s original complaint, but he later amended his complaint to match the August 21 date that Ms. Stojka listed in her counter-complaint.

counter-complaint for limited divorce. She asked the court to award her, *inter alia*, sole legal and primary physical custody of the children subject to Mr. Stojka’s visitation, as well as child support, alimony, and use of the family-use property for at least three years. Both parties eventually amended their complaints as solely for absolute divorce.

Following discovery and two pre-trial conferences, the parties agreed to settle most of the claims at issue. On May 7, 2016, they entered a consent order, agreeing to list for sale both jointly-owned marital properties. The parties executed a Partial Marital Separation Agreement (“PMSA”), resolving nearly every remaining issue, including those related to custody, visitation, and alimony. The two issues that remained unsettled going into trial were the division of Mr. Stojka’s military retirement pay and survivor benefits.

B. Trial

The parties appeared in court on August 17, 2016. During the first portion of the trial, the parties established the grounds for an uncontested divorce based on testimony by Mr. Stojka and Ms. Kathleen Lewis, Ms. Stojka’s mother.

The proceedings then turned to the outstanding issues concerning Mr. Stojka’s military retirement pay and survivor benefits. Mr. Stojka testified that he is a Major in the United States Marine Corps. He has been active duty since November 1999 and will become eligible for military retirement pay if he maintains active duty status through May 2019, meeting the 20 years of service required for eligibility. He testified that he tentatively planned to retire in June 2019, however, he cautioned that it was not guaranteed that he would remain on active duty status until May 2019. Although on cross-examination he admitted that he lacked any specific information indicating he would be taken off active

duty, he stated on direct that he may lose his position prior to May 2019 because

[t]he government is downsizing, so they are looking to basically lay people off for various reasons. And so, for example, last year they did a ten percent cut where officers not budgeted for promotion had to retire early, for example. And then they could also, if there is an issue and they find you culpable of negligence, they can basically put you out early with no severance package whatsoever.

Therefore, he continued, it was possible that he may not be able to receive his military retirement pay or could be entitled to only a reduced amount.

In regard to his survivor benefit plan, Mr. Stojka testified that if the court ordered him to name Ms. Stojka as his beneficiary, there would be a significant cost to apportion those benefits and he would be unable to name another person, including a future spouse, as his survivor beneficiary.

Ms. Stojka did not testify. Mr. Stojka's counsel argued in closing that Ms. Stojka should be entitled to only a reduced amount of Mr. Stojka's military retirement pay because a portion of his benefits accrued before the marriage and a portion would continue to accrue after the marriage. He also noted that there was no evidence that Mr. Stojka was disabled or would become disabled, but observed that "we are not in control of these things" and Mr. Stojka could get into an accident leaving the courthouse. Despite this, however, he argued that the court had no authority, absent an agreement between the parties, to order Mr. Stojka to compensate Ms. Stojka for any share of his military retirement pay that he may waive in favor of military disability benefits. As for Mr. Stojka's survivor benefit annuity, counsel urged the court not to order Ms. Stojka to be named as the beneficiary because Ms. Stojka "stopped" participating in the marriage and because the survivor

benefit was a “one shot deal,” meaning that if he named Ms. Stojka as a beneficiary, he would be unable to provide that benefit to a future spouse.

During her closing, Ms. Stojka’s counsel presented a proposed judgment to the court and opposing counsel, awarding Ms. Stojka 50% of the marital share of Mr. Stojka’s “gross Military Retired Pay” to be calculated by dividing the length of Mr. Stojka’s creditable service during the marriage by the length of Mr. Stojka’s total creditable service. She explained that she put the actual fraction in the proposed judgment order rather than the “if, as and when” language” in order to “be a little more clear.” Ms. Stojka’s counsel also asked the court to retain continuing jurisdiction to modify the pension division payment or the property division payment should Mr. Stojka waive his right to gross military retirement pay in favor of “an equivalent amount of any other compensation[.]” She argued, for instance, that Mr. Stojka could waive his pension benefits in favor of disability pay and that the court should be able to “adjust the equities between the parties so as to carry out the intent of the Court in this Order.” Moving on to the survivor benefit annuity, Ms. Stojka’s counsel urged the court to name Ms. Stojka as the beneficiary because she did not “quit” on the marriage, as Mr. Stojka’s counsel suggested, but rather cared for the children while Mr. Stojka was away on duty, and, because Ms. Stojka would be left to care for the children alone in the event of Mr. Stojka’s death. Counsel suggested that it would be fair to divide the survivor benefit plan equally.

In rebuttal, Mr. Stojka’s counsel reiterated his belief that the court had no authority, absent an agreement by the parties, to indemnify Ms. Stojka for Mr. Stojka’s potential disability retirement benefits. He also asked the trial judge to reserve judgment until he

could submit a proposed judgment order of his own.

The trial judge then concluded the proceedings, indicating that she would take the parties' arguments under consideration and have them return the following week so that she could issue her ruling on the record.

C. The Court's Ruling

One week later, on August 24, 2016, the parties returned to the circuit court and the judge announced the following findings and ruling:

I don't believe there should be an issue with the Court describing it as disposable military retirement pay due to the cost of living adjustment in this case. That is to be divided 50-50 based on the marital share and based on the length of the marriage in this case, which is nearly a ten-year marriage. That's what it will be called.

In this case, Mr. Stojka has asked the Court to, and I think, although there was some disagreement about whether it should be called gross military pay or disposable military pay, the statute is pretty clear in characterizing it or calling it disposable retirement pay. So that's what I am going to call it as well, and Mrs. Stojka is entitled to her share of the marital portion of that in this case.

With respect to the issue that Mr. Stojka raised about whether he would become disabled or whether there would be a reduction in force or whether he would be not selected for promotion in this case, I think the only possibility that exists is the last one, that he might not be selected for promotion and may have to leave the service earlier than obtaining his 20 years in the Marine Corps. I certainly think at this point that I can't speculate as to whether that would happen or not, but I think that Mrs. Stojka should get the benefit of what the parties bargained for in light of what the statute requires in this case. Just like in *Allen* [*v. Allen*, 178 Md. App. 145 (2008)] where the service member had agreed that the spouse, the non-service member, would be entitled to a share of his disposable military retirement pay, and then that service member ended up retiring with a disability which undercut the spouse's – the non-military spouse's ability to share in the retirement, the Court found that the manner in which the circuit court trial judge granted the non-military spouse the benefit of her bargain.

So in this case, there is some ability of this Court to find that if Mr. Stojka either has a reduction in force, or even if it's disability or even if it's non-selection for promotion, to at least give Mrs. Stojka the

benefit of any amounts that would have accrued if those things happened and he no longer is able to receive a disposable military retirement pay.

With respect to the issue of survivor's benefit, Mr. Stojka characterized Mrs. Stojka's involvement in the marriage at the point where the parties separated as she "quit" on the marriage. I don't find that to be the case here. Marriages fall apart for many, many reasons, and certainly things often are a lot more difficult when it's a military family and the military spouse is subject to lengthy deployments or frequent deployments, and it's tough even in marriages where the parties reside under the same roof continuously to hold those marriages together, but I don't think Mrs. Stojka should be penalized by not being entitled to survivor's benefits in this case or having to pay the full cost of those survivor's benefits.

In any event, therefore, **I would rule that she's entitled to the survivor's benefit, that [] will be irrevocable, and that the parties will split the cost if there is any cost for doing so.**

So other than that, this Court therefore will adopt the partial Marital Settlement Agreement, incorporate but not merge the terms into the Judgment of Absolute Divorce, and grant the . . . divorce on the grounds of the statutory separation in this case.

The judge then instructed the parties to make one modification to Ms. Stojka's proposed judgment for absolute divorce:

So I have reviewed the Judgment of Absolute Divorce that counsel for Mrs. Stojka prepared in this case. Everything with the exception of the paragraph on page three of four, the third full paragraph needs to be modified. That's the only paragraph that needs to be modified.

Currently it reads, "Ordered that the defendant/counter-plaintiff shall receive an amount equal to 50 percent of the marital share of plaintiff's/counter-defendant's gross military retirement pay." So gross military retirement pay should be written to reflect disposable military retirement pay in accordance with the language of the statute in this case.

The trial judge then clarified that Mr. Stojka's theoretical military retirement pay would be subject to an "if, as and when" distribution, and reiterated that the partial settlement agreement was incorporated but not merged into the judgment before adjourning the hearing.

Following this hearing, both parties proposed their own version of the judgment,

revised to reflect their interpretation of the trial court’s instruction concerning the third full paragraph on page three. According to letters each party’s attorneys sent the court on September 15, 2016, neither party would sign the other party’s version. On September 19, after reviewing both proposed orders and the transcript from the August 24 hearing, the court entered the judgment submitted by Ms. Stojka’s counsel. In the final judgment, paragraph three on page three read:

ORDERED, that Defendant/Counter-Plaintiff is and shall be deemed as the irrevocable beneficiary of the survivor’s benefit plan (SBP) through Plaintiff/Counter-Defendant’s military retirement as the former spouse of Plaintiff/Counter-Defendant, and Plaintiff/Counter-Defendant shall execute such paperwork as is required to make or extend the election of Defendant/Counter-Plaintiff as said beneficiary, and shall do nothing to reduce or eliminate that benefit to Defendant/Counter-Plaintiff[.]

The final judgment also contained an order stating:

ORDERED, that the Court retains continuing jurisdiction to modify the pension division payments or the property division specified herein if Plaintiff/Counter-Defendant should waive gross military retired pay for an equivalent amount of any other compensation, including but not limited to, VA disability compensation, and this action reduced the Defendant/Counter-Plaintiff’s share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the Defendant/Counter-Plaintiff’s share or amount to the pre-waiver level or to require payments or property transfers from the Plaintiff/Counter-Defendant that would otherwise adjust the equities between the parties so as to carry out the intent of the Court in this order[.]

On September 28, 2016, Mr. Stojka noted his timely appeal to this court.²

² Mr. Stojka initially noted an appeal on September 15, 2016, after the court’s oral ruling but before its written final judgment. This first appeal merged with his second.

DISCUSSION

I.

Military Retirement pay

To support his first issue, Mr. Stojka presents three different reasons why he believes the circuit court’s reservation of continuing jurisdiction was error: (1) Maryland Code (1984, 2012 Repl. Vol.), Family Law Article (“FL”) § 8-203 requires courts to determine what constitutes marital property within 90 days of its final judgment absent consent of the parties; (2) the award violated the Uniformed Services Former Spouses’ Protection Act (“USFSPA”) because he did not consent to it; and (3) by signing the PMSA (the partial marital settlement agreement), Ms. Stojka waived her right to have the court retain jurisdiction.

A. FL § 8-203

Mr. Stojka’s first contention is that under FL § 8-203, the circuit court may only retain jurisdiction over marital property for 90 days from its grant of absolute divorce, at which point its jurisdiction extends beyond 90 days *only* with the consent of the parties.

Ms. Stojka responds that FL § 8-203 only limits the court’s authority to reserve, for 90 days, its *determination* of what property constitutes marital property, not the *division* of that property. According to Ms. Stojka, nothing in the statute limits the time in which the court may revisit its division of marital property or divests the court of the jurisdiction to do so. Ms. Stojka contends that neither party has challenged the court’s decision (also

agreed to in the PMSA) that Mr. Stojka’s military benefits were marital property.³

We agree with Ms. Stojka. FL § 8-203, which treats military pensions in “the same manner as any other pension or retirement benefit,” provides:

- (a) *Time of court action.* – In a proceeding for an annulment or an absolute divorce, if there is a dispute as to whether certain property is marital property, **the court shall determine which property is marital property:**
- (1) when the court grants an annulment or an absolute divorce;
 - (2) within 90 days after the court grants an annulment or divorce, if the court expressly reserves in the annulment or divorce decree the power to make the determination; or
 - (3) **after the 90-day period if:**
 - (i) the court expressly reserves in the annulment or divorce decree the power to make the determination;
 - (ii) during the 90-day period, the court extends the time for making the determination; *and*
 - (iii) **the parties consent to the extension.**

(Emphasis added).

The trial court below did not reserve beyond 90 days the authority to *determine* what property was marital property. It had already done so. What the court did instead was reserve “continuing jurisdiction to modify the pension division payments or the property division[.]”

Judge Moylan, writing for this Court, has explained that “the designation of marital property” and “the granting of a monetary award” are “separate, albeit related, steps in a

³ Ms. Stojka notes that the PMSA explicitly described “the military retirement pension plan and survivor benefits annuity as “*marital property* interests.” (Emphasis added). Additionally, she seems to suggest—without saying so outright—that Mr. Stojka waived this issue, pointing out that Mr. Stojka did not object at trial to the court’s authority to retain continuing jurisdiction when Ms. Stojka sought the indemnification language. Regardless, we need not address Ms. Stojka’s suggestion of waiver because we conclude that Mr. Stojka’s argument lacks merit.

three-step process.” *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 470 (2002) (noting that the issue was “not ultimately critical to [the petitioner’s] contention[.]”). Those three steps are: (1) “the judge ‘shall determine which property is marital property[.]’” as “spelled out in [FL] § 8-203[.]”; (2) “the judge then ‘shall determine the value of all marital property[.]’” as “spelled out in § 8-204[.]”; and (3) “the judge ‘may . . . grant a monetary award’” as provided in § 8-205. *Id.* at 470-71; *see also Harper v. Harper*, 294 Md. 54, 79 (1982) (setting out this three-step process). “Although the three steps are inextricably intertwined,” and “are almost always telescoped into a single phenomenon, they are not literally the same.” *Id.* at 471. The time limits set out in § 8-203 “apply only to Step One.” *Id.* Then, quoting liberally from the third edition of *Maryland Family Law* by Fader and Gilbert, Judge Moylan highlighted the importance of this distinction and how it affects pension cases in particular:

It is important to note again that *it is [to] the determination as to which property is marital property, that the 90-day time limit on presentation is applicable—not to the granting of a monetary award.* This distinction may be important, particularly in cases of pension evaluation, where out-of-state uncooperative pension trustees may delay furnishing information necessary to make the monetary award possible within the 90 days of divorce under § 8-205. The trial judge may, however, be able to decide whether and to what extent a pension is marital property within the 90-day period . . . [T]he statute has to mean what it says as it says what it means.

. . . if there is a dispute as to whether certain property is marital property,

. . . the court shall determine which property is marital property[.]

Id. at 471-72 (quoting Fader and Gilbert, *Maryland Family Law*, 15-26 and 15-27 (3d ed. 2000) (emphasis in *Steinhoff*)).

Here, like the petitioner in *Steinhoff*, Mr. Stojka “falls into the common error of

conflating” the court’s determination of marital property with its distribution of that property. *See* 144 Md. App. at 470. The trial court below determined that Mr. Stojka’s disposable military benefits were marital property when it granted the parties an absolute divorce. It did not, therefore, run afoul of the time limitation in FL § 8-203. And because FL § 8-205 places no similar timing requirement on the court’s distribution of that property, we discern no error in its retention of continuing jurisdiction so long as its award does not offend the USFSPA.

B. USFSPA

Next, Mr. Stojka assigns error to the circuit court’s order retaining jurisdiction in order to indemnify Ms. Stojka should Mr. Stojka waive his disposable retirement pay because there was no agreement between the parties concerning retirement pay. He points out that all of the Maryland cases on which Ms. Stojka relies authorizing a court to later indemnify a party in order to compensate for waived retirement benefits applied contract law to the parties’ written agreements concerning those benefits. *See Wilson v. Wilson*, 223 Md. App. 599 (2015); *Allen v. Allen*, 178 Md. App. 145 (2008); *Dexter v. Dexter*, 105 Md. App. 678 (1995).

The parties submitted their briefs to this Court in February and March, 2017, before the Supreme Court’s decision in *Howell*, *supra*, 137 S. Ct. 1400, and our subsequent decision in *Hurt*, *supra*, ___ Md. App. ___, No. 2328, September Term, 2014. Both parties agree that these cases control at least part of this issue.

In May, the Supreme Court issued its decision in *Howell*, holding that in accordance with the precepts established in *Mansell v. Mansell*, 490 U.S. 581 (1989), state

courts are preempted from ordering a military spouse to “reimburse” or “indemnify” his or her former spouse for a portion of disposable military retirement pay that the military spouse waives in lieu of tax-free disability benefits. 137 S. Ct. at 1406. This Court summarized the Supreme Court’s ruling as follows:

Put another way, the veteran’s ability under federal law to waive retirement pay for disability benefits, at whatever time his disability status might change, overrides (preempts!) any state law agreement he might have made, *or state court judgment to which he was a party*, relating to his military retirement benefits, and the parties and state court should . . . factor[] this possibility when valuing the parties’ marital property[.]

Hurt, ___ Md. App. at ____, slip op. at 15 (emphasis added). We concluded that *Howell* abrogated our holdings in *Wilson*, *Allen*, and *Dexter*, permitting a trial court to revisit a marital award to require the military spouse to use other assets to compensate the non-military spouse for any deduction in disposable retirement pay caused by a waiver in lieu of disability benefits. *Id.*, slip op. at 17 (discussing *Wilson*, 223 Md. App. at 629; *Allen*, 178 Md. App. at 146; *Dexter*, 105 Md. App. at 680). The result of this, we continued, was that the military spouse’s “ability to elect disability benefits over retirement pay overrides our courts’ ability to amend the marital property award to reflect post-judgment changes in circumstances.” *Id.*

We went on to suggest, however, that “the preemptive scope of *Howell* governs only the treatment of [disability benefits] in this analysis of marital property awards, and doesn’t seem to preclude a court from considering the contingent or diminished value of a military pension in connection with other relevant decisions in divorce cases.” *Id.*, slip op. at 18.

Returning to the case at bar, the parties had an opportunity to address the

applicability of *Howell* and *Hurt* during oral argument before this Court. Mr. Stojka argued that the Supreme Court’s decision in *Howell* governed the court’s authority to retain continuing jurisdiction because waiver in favor of disability benefits was effectively the only way that Mr. Stojka would receive a diminished amount of his “theoretical” military retirement pay. Ms. Stojka’s counsel conceded that *Howell* overruled the circuit court’s authority to indemnify Ms. Stojka based on Mr. Stojka’s acceptance of military disability benefits, but argued that *Howell* would not control the court’s authority to adjust its judgment should Mr. Stojka, for example, waive his military retirement pay to increase potential future benefits through the Civil Service Retirement System (“CSRS”) or the Federal Employees Retirement System (“FERS”).

The trial court’s oral ruling here made clear that it reached its decision in reliance on this Court’s now-abrogated decision in *Allen* and its assumed ability to revisit its decision to provide Ms. Stojka “what the parties bargained for.” What makes this case different from *Howell* and *Hurt*, however, is that the court contemplated the ability to maintain continuing jurisdiction to revisit the division of pension payments not only in the case of potential disability, but also if Mr. Stojka saw a reduction in force or was not selected for promotion. We do not read *Howell* to limit a state court’s ability to revisit its distribution of military retirement pay if the military spouse were to waive those benefits in favor of benefits under the CSRS or FERS. Certainly, the future of any military retirement benefits is uncertain and what scenario may present itself to the court in the

future is, at this juncture, speculative at best.⁴ We will not declare that the circuit court may retain no jurisdiction over its judgment concerning the parties’ pension benefits as Mr. Stojka entreats.

That portion of the court’s order that specifically addresses a reduction in pay based on Mr. Stojka’s potential qualification for disability benefits, however, runs afoul of *Howell*, and is, therefore in error. Accordingly, on remand we direct the circuit court to strike that portion of its order retaining jurisdiction to modify the pension division payments should Mr. Stojka waive gross military retirement pay for VA disability compensation.

C. Waiver under the Settlement Agreement

Mr. Stojka contends that the court’s reservation of jurisdiction was in contravention of the plain language of the “Mutual General Release” contained in the PMSA by which the parties waived all future claims concerning marital property and “monetary award as an adjustment of the equities and rights of the parties concerning marital property, and to have a court transfer ownership of any interest in a pension, retirement profit sharing, or deferred compensation plan from one party to either or both parties.” This release provision also states that its provisions “are not subject to modification by any court.” Mr. Stojka urges us to reverse the circuit court’s retention of jurisdiction for the reason stated

⁴ As we next explain in part C, however, under the PMSA, the parties waived their right to ask the court to transfer interest in *any* other marital property—including a monetary award or an ownership interest in any other pension or retirement plan. We note that the court’s ability to retain jurisdiction over Mr. Stojka’s military retirement benefits—although proper as a matter of law—may ultimately have no practical effect in this case under the terms of the PMSA.

in the judgment “to adjust the equities between the parties.”

Ms. Stojka argues that the parties did not waive the court’s ability to reserve jurisdiction, because the mutual general release on which Mr. Stojka relies includes the clause “[e]xcept as otherwise provided in this agreement[,]” and the PMSA provides in another section that “[t]he parties specifically reserve on the matter of division of the marital property interests with regard to the military retirement pension plan and survivor benefit annuity, pending further agreement of the parties or Order of the Court.” Thus, according to Ms. Stojka, the court’s reservation of judgment was incidental to Mr. Stojka’s military pension and related marital benefits, which the parties had explicitly excepted from the reach of the release clause.

The relevant provisions of the PMSA are:

ITEM 19: RETIREMENT ASSETS

a) Husband’s Military Retirement Benefits

Husband is on active duty in the United States Marine Corps and is or will be eligible for retired [sic] pay and had a survive benefit annuity available to him, which is titled in Husband’s name or held for his benefit. **The parties specifically reserve on the matter of division of the marital property interests with regard to the military retirement pension plan and survivor benefits annuity, pending further agreement of the parties or Order of the Court.**

(Emphasis added).

The PMSA also included a general release clause, which provided in pertinent part:

ITEM 28: MUTUAL GENERAL RELEASE

Except as otherwise provided in this Agreement:

- a) Each party absolutely and unconditionally releases the other and

the estate of the other from any and all rights, causes of action, claims and obligations which either may have, whether arising out of the marriage or otherwise . . . **The release shall include, but not be limited to, a release and waiver of all claims to possession and use of the family home, possession and use of family use personal property, marital property, and monetary award as an adjustment of the equities and rights of the parties concerning marital property, and to have a court transfer ownership of an interest in a pension, retirement, profit sharing, or deferred compensation plan from one party to either or both parties.**

(Emphasis added).

ITEM 31: MODIFICATION OF AGREEMENT

* * *

With the exception of any issue explicitly reserved in this Agreement, the provisions of this Agreement are not subject to modification by any court, pursuant to the Family Law Article, Title 8, Section 8-103 of the Annotated Code of Maryland. This Agreement is entered into in full recognition of the Family Law Article, Title 8, Sections 8-201 through 8-214 of the Annotated Code of Maryland 1984, 1990 Cumulative Supplement[.]

(Emphasis added).

Collectively, these provisions reserve for the trial court *only* the “division of marital property interests with regard to the military retirement pension plan and survivor benefit annuity.” The parties waived their right to ask the court to transfer interest in *any* other marital property—including a monetary award or an ownership interest in any other pension or retirement plan. Put differently, although the trial court may retain continuing jurisdiction over the military retirement pay and survivor benefit annuity, the PMSA restricts its ability to indemnify Ms. Stojka from any source other than the military retirement pension plan and survivor benefits in an attempt to balance the equities of the

parties.⁵ Therefore, we conclude that language contained in the Court’s final order permitting the court “require payments or property transfers from the Plaintiff/Counter-Defendant that would otherwise adjust the equities between the parties” was contrary to the plain language of the PMSA.

II.

“If, as, and when”

In support of his second issue, Mr. Stojka contends that the circuit court erred by executing a judgment on September 19 that differed substantially from the oral opinion it gave at the August 24 hearing. According to Mr. Stojka, the court ruled orally that the military pension was to be divided on an “if, as and when” basis, but omitted that ruling from its subsequent written order.⁶ Because neither party filed a motion asking the court to amend its judgment, Mr. Stojka argues that the court lacked the authority to do so. Besides, Mr. Stojka continues, it would be error to divide his military pension on any basis other than “if, as and when,” because FL § 8-204 requires such a distribution. Based on

⁵ For instance, if Mr. Stojka were to waive his military retirement pay in favor of benefits under the CSRS or FERS, the circuit court may not transfer an ownership interest in that pension to Ms. Stojka as indemnification for her lost interest in Mr. Stojka’s military retirement pay.

⁶ Mr. Stojka also argues that the court’s order omitted its oral ruling that the parties would split any potential cost related to the division of survivor benefits. Ms. Stojka responded that 10 U.S.C. § 1408(a)(4)[(A)(iv)] requires the cost to be “taken off the top” of any retired military benefits payments, so, given the parties’ 50% interest in those payments, the parties will necessarily be splitting the cost associated with naming Ms. Stojka as beneficiary to the annuity. Mr. Stojka does not reply to this argument. On remand, the circuit court should determine whether its written judgment accurately reflects its oral ruling in this regard.

this, Mr. Stojka asks us to remand the case and instruct the court to amend its September 19 written judgment to match its August 24 oral ruling.

Ms. Stojka responds that although the court’s judgment did not include the specific phrase “if, as and when,” it included the exact equation for an “if, as and when” division of benefits as this Court defined in *Bangs v. Bangs*, 59 Md. App. 350, 356 (1984), and clarified in *Heger v. Heger*, 184 Md. App. 83, 109 (2009). Based on this, Ms. Stojka contends that the formula contained in the court’s order complied with the requirements of Section 1408 by expressing the division of benefits as a percentage of disposable retirement pay.

The Court of Appeals in *Deering v. Deering*, 292 Md. 115 (1981), recognized a variety of approaches that were available to trial courts attempting to accomplish the “complex task [of] properly valuing and allocating retirement benefits between former spouses.” *Id.* at 129. The third method that the court discussed, was “to determine a fixed percentage for [the non-employee spouse] of any future payments [the employee spouse] receives under plan, payable to [the non-employee spouse] as, if, and when paid to [the non-employee spouse].” *Id.* at 130-31. For this situation, this approach was favorable to other options, the Court reasoned, because it did not require the trial court to attempt to value the pension fund, and instead required only that the court “determine the appropriate percentage to which the non-employee spouse is entitled.”⁷ *Id.* at 131.

⁷ We note, however, that the Supreme Court in *Howell* suggested that, in light of its decision, state courts “remain[] free to take account of the contingency that some military retirement pay might be waived” and may “take account of reductions in value when [they] calculate[] or recalculate[] the need for spousal support.” 137 S. Ct. at 1406.

Three years later, in *Bangs*, this Court reviewed a trial court’s application of this “as, if, and when” approach. 59 Md. App. at 356. There, the trial court awarded the wife “a monetary award of \$32,900 plus a future sum or sums of money equal to a fractional share of [the husband’s] retirement pension if, as and when he receives it.” *Id.* The court created the following formula to calculate that award: the wife would receive “one-half of a fraction of which the number of years and months of the marriage (12 years, 7 months) is the numerator and the total number of years and months of employment credited toward retirement is the denominator[.]” *Id.* This formula became known in Maryland as “the *Bangs* formula.” *Heger v. Heger*, 184 Md. App. 83, 87 (2009). More recently, in *Heger*, this Court clarified “that it is incontrovertibly implicit” that the numerator in the *Bangs* formula includes only “‘**WORKING** years and months of marriage’ or ‘Years and months of marriage **IN WHICH THE PENSION CONTINUES TO ACCRUE AND GROW.**’” *Id.* at 108.

Here, the trial court ordered that

[Ms. Stojka] shall receive an amount equal to fifty percent (50%) of the marital share of [Mr. Stojka’s] disposable military retirement pay (**the marital share shall be calculated by a fraction, the numerator of which the total number of months of [Mr. Stojka’s] creditable service during the parties’ marriage, and the denominator of which shall be the total months of [Mr. Stojka’s] creditable service**), together with any future cost-of-living increases with respect thereto.

(Emphasis added).

It is clear to us that the formula the court employed in this bolded parenthetical *is* the *Bangs* formula as explained more fully in *Heger*, which *is* the “if, as and when” distribution that Mr. Stojka requested before the trial court and that the trial court stated it

intended to apply. Mr. Stojka directs us to no law imposing the use of the term “if, as and when”; we see no reason to impose a requirement of formulaic language on top of the arithmetic formula the court applied here.

We do not consign error to the court’s failure to use the specific phrasing Mr. Stojka prefers. In reciting its oral ruling, the court stated:

So I have reviewed the Judgment of Absolute Divorce that counsel for Mrs. Stojka prepared in this case. Everything with the exception of the paragraph on page three of four, the third full paragraph need to be modified. That’s the only paragraph that needs to be modified.

Currently it reads, “**Ordered that [Ms. Stojka] shall receive an amount equal to 50 percent of the marital share of [Mr. Stojka’s] gross military retirement pay.**” **So gross military retirement pay should be written to reflect disposable military retirement pay** in accordance with the language of the statute in this case.

As we have said, the final judgment ordered “that [Ms. Stojka] shall receive an amount equal to fifty percent (50%) of the marital share of [Mr. Stojka’s] disposable military retired pay[.]” As should be self-evident from comparing the original iteration with the amended one, the final judgment reflected precisely what the trial court ordered in its oral ruling.

**JUDGMENTS AFFIRMED IN PART
AND REVERSED IN PART. CASE
REMANDED TO THE CIRCUIT
COURT FOR HARFORD COUNTY
FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS
OPINION. EACH PARTY TO PAY
ITS OWN COSTS.**