

2012 IL App (2d) 110251-U
No. 2-11-0251
Order filed January 24, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re MARRIAGE OF)	Appeal from the Circuit Court
CAROL A. KUNKEL-PARKIN,)	of Du Page County.
)	
Petitioner-Appellee,)	
)	
and)	No. 92-D-3196
)	
ERNEST R. PARKIN,)	Honorable
)	Patrick J. Leston,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: The trial court properly divided the respondent's military retirement benefits between the parties.

¶ 1 The respondent, Ernest Parkin, appeals from the February 9, 2011 order of the circuit court of Du Page County dividing his military retirement benefits between himself and the petitioner, Carol Kunkel-Parkin. We affirm.

¶ 2 The parties were married on December 13, 1975. Ernest was in the Navy from June 1970 until March 1977. He was in the Naval Reserve thereafter until July 1990. Carol filed a petition for

dissolution of marriage on January 10, 1990. At the trial on the petition for dissolution, the parties argued over how much of Ernest's Navy retirement benefits should be awarded to Carol. Ernest introduced evidence that his 20 years of service in the Navy and Naval Reserve qualified him for retirement benefits. Carol argued that because she was married to Ernest for about 72.5% of the time period during which the retirement benefits accrued (1975-1990), approximately 72.5% of the retirement benefits were marital property. Thus, an award of 50% of the retirement benefits to her would be appropriate. Ernest argued that the evidence he introduced indicated that he had earned 3,431 points for his military service. Of this amount, 2,013 points (58.67%) were earned prior to the marriage. Ernest maintained that Carol's award should only be based on his 1,418 marital points. The trial court agreed with Carol's argument and awarded her 50% of Ernest's military retirement benefits.

¶ 3 Ernest appealed the trial court's decision, and this court affirmed. *In re Marriage of Parkin*, No. 2-91-0346 (1992) (unpublished order under Supreme Court Rule 23) (*Parkin I*). We explained that the portion of a pension that constitutes marital property is generally calculated by determining the ratio between the number of years that the pension accumulated during the marriage and the total years of accumulation. *Id.* at 3, citing *In re Marriage of Davis*, 215 Ill. App. 3d 763, 773 (1991). We noted that this method produced the 72.5% figure suggested by Carol. We further found that Ernest had failed to present sufficient evidence to establish that more than 50% of his pension was nonmarital. We stated:

“The evidence concerning Ernest's pension points was not sufficient to establish the value of the premarital portion of the pension. First of all the evidence does not establish, as Ernest contends, that he accumulated [2,013] pension points prior to the marriage. Instead the

November 1990 document states that he accumulated 2,455 points between June 1970 and March 1977, the period during which he was an active member of the Navy. The parties were married in December 1975.

Ernest apparently attributes [2,013] of these 2,455 points to the period prior to his marriage on the basis of the ratio between the time that these points accumulated prior to the marriage and the total amount of time they accumulated. Ernest presented no evidence to the trial court, however, indicating that these points were earned solely on the basis of time served. Therefore, no evidence was presented establishing how many of the points were earned prior to the marriage.

In a petition for rehearing, Ernest cites for the first time in either the trial court or on appeal a statute indicating that one Navy retirement pay point is credited for each day of active service (see 10 U.S.C. sec. 1332(a)(2)(A)(I)). In this context, Ernest relies upon the existence of the statute as proof of the fact that Naval personnel receive one retirement pay point for each day of service. Because no evidence relating to this fact was introduced at trial, however, this contention is waived for purposes of review. (*In re Estate of Cohan*, 59 Ill. App. 3d 963, 966 (1978); *Bellomy v. Bruce*, 303 Ill. App. 349, 364 (1940). Even if we consider Ernest's argument as a legal rather than a factual contention, it is waived because of his failure to raise it at trial or in his original brief. *Standard Bank & Trust Co. v. Callaghan*, 215 Ill. App. 3d 76, 81-82 (1991).

Because Ernest failed to establish in the trial court the value of the premarital portion of the pension the proper method of determining what portion constitutes marital property is the method suggested by Carol. Therefore since approximately 72.5% of the pension was

marital property the 50% share awarded to Carol did not constitute an award of Ernest's nonmarital property.” *Id.* at 3-4.

The Illinois Supreme Court subsequently denied Ernest's petition for leave to appeal. *Kunkel-Parkin v. Parkin*, 146 Ill. 2d 630 (1992).

¶ 4 On September 3, 2009, Carol filed a motion to correct scrivener's error and to modify the language in the judgment to comply with the federal government's requirements when dividing military retirement benefits. The motion explained that there was a scrivener's error in the judgment order because it provided that Ernest was to be awarded 50% of Carol's United States Navy pension. In fact, Carol was to be awarded 50% of Ernest's United States Navy retirement benefits. Carol also requested that the judgment order be modified so that it would be consistent and enforceable under the Uniformed Services Former Spouse's Protection Act (USFSPA).

¶ 5 On May 24, 2010, Ernest filed a response. He asserted that at the time of the judgment, he only had 20 years of service. At the time he was able to receive his military retirement benefits, he had accumulated an additional 17 years of creditable service as an inactive reservist with the rank of Commander. He therefore argued that a modified award should take his additional years of service into consideration.

¶ 6 On September 14, 2010, following a hearing, the trial court granted Carol's motion. The trial court entered an order which provided:

“The former spouse [Carol] is awarded a percentage of the member's [Ernest's] disposable military pay, to be computed by multiplying 50% times a fraction, the numerator of which is 3,431 Reserve retirement points, divided by the member's [Ernest's] total number of Reserve retirement points earned.”

Following the denial of his motion to reconsider, Ernest filed a timely notice of appeal.

¶ 7 On appeal, Ernest argues that the trial court's order improperly awards part of the nonmarital portion of his military retirement benefits to Carol. Ernest insists that as he earned the majority of his retirement points prior to his marriage to Carol, the trial court erred in awarding her 50% of those points. In response, Carol insists that, as this court already addressed this contention in *Parkin I*, Ernest's argument is barred by the law of the case doctrine.

¶ 8 Generally, the law of the case doctrine bars relitigation of an issue previously decided in the same case. *Long v. Elborno*, 397 Ill. App. 3d 982, 989 (2010). This doctrine applies to both issues of law and of fact. *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 910 (2007). Questions of law that are decided on a previous appeal are binding on the trial court on remand as well as on the appellate court in subsequent appeals. *Long*, 397 Ill. App. 3d at 989. The law of the case doctrine protects settled expectations of the parties, ensures uniformity of decisions, maintains consistency during the course of a single case, effectuates proper administration of justice, and brings litigation to an end. *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005). The two recognized exceptions to the law of the case doctrine are: (1) when a higher reviewing court makes a contrary ruling on the same issue subsequent to the lower court's decision, and (2) when a reviewing court finds that its prior decision was palpably erroneous. *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). A court's decision will be considered palpably erroneous if that decision was clearly erroneous and would work a manifest injustice. See *People v. Jacobazzi*, 398 Ill. App. 3d 890, 931(2010).

¶ 9 We agree with Carol that Ernest's argument is barred by the law of the case doctrine. Ernest insists that this court did not make any determination in *Parkin I* as to what portion of his points were nonmarital. Ernest's argument, however, overlooks the fact that the reason the trial court and

this court did not consider his argument is because he did not raise it in a timely fashion. We specifically addressed this argument in the first appeal and held that, because he did not present any evidence as to this issue until the petition for rehearing, his argument was forfeited. See *id.* As our ruling was not reversed by a higher court nor was it palpably erroneous, we reject Ernest's first argument.

¶ 10 We next consider Ernest's alternate contention that the trial court erred in awarding Carol credit for 50% of his postmarital years of service. Ernest notes that at the time he was to begin collecting his pension, he had accumulated 37 years of service, 17 of which were post-divorce. By awarding Carol a 50% interest in all of his Navy retirement benefits, Ernest insists that the trial court erred in allowing Carol to share in his further accumulation of years of service beyond the 1991 dissolution date.

¶ 11 Ernest's argument is without merit. The trial court's order was based on the 3,431 points that Ernest earned for his military service. All of these points were earned prior to the dissolution of the marriage. As Ernest did not earn any points after the dissolution, the trial court could not have awarded any of his postmarital points to Carol.

¶ 12 Finally, we reject Ernest's argument that *Parkin I* required the trial court to analyze his military retirements benefits as a pension and to consider his 37 years of service. Ernest points out that pensions do not use points to determine how benefits become fully vested. See 29 U.S.C. §203(b). Instead, relying on *Davis*, 215 Ill. App. 3d at773, Ernest argues that "the ratio between the number of years that the pension accumulated during the marriage and the total years of accumulation" is used. Ernest misconstrues our holding in *Parkin I*. We analyzed his military retirement pay points the same way we would a pension because Ernest presented no evidence why

we should analyze it differently. As such, we determined that his retirement pay points were earned at the same rate as one who was earning a pension. It was thus appropriate to divide his military retirement pay in the same way a pension was divided. In essence, the trial court in *Parkin I* determined that Ernest's military retirement pay points should be divided evenly between the parties. This court affirmed that decision in *Parkin I*. The trial court's judgment at issue here is consistent with *Parkin I* as it evenly divided the military retirement pay points between the parties. We now affirm that decision.

¶ 13 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 14 Affirmed.