

NOTICE
Decision filed 07/31/17. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (5th) 160217-U

NO. 5-16-0217

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

AMY J. WINTERS,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Marion County.
)	
v.)	No. 13-D-183
)	
JIMMY D. WINTERS,)	Honorable
)	Stanley Brandmeyer,
Respondent-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly ordered Husband to pay Wife support in the amount to which the parties previously agreed in spite of the fact that such amount exceeded what is generally permitted with respect to military retirement benefits.

¶ 2 Husband, Jimmy D. Winters, appeals the judgment of the circuit court of Marion County requiring him to continue to pay to Wife, Amy J. Winters, a portion of his retirement benefits. Husband argues on appeal that the court erred in ordering him to pay more of his disposable military retirement pay to Wife than is permitted. We affirm.

¶ 3 Husband and Wife were married in November 1989. Shortly after the marriage, Husband began basic training with the United States Air Force. He remained in the Air

Force for 23 years, retiring in October 2010. During those 23 years, four children were born to the marriage. Wife worked only part time during the marriage because of numerous moves made over the years for Husband's Air Force career and because she was homeschooling the children.

¶ 4 On October 31, 2013, Wife filed a petition for dissolution of the parties' marriage. In a temporary order entered in January 2014, Husband was to pay Wife \$2000 per month in support. At the time of the trial, Husband testified that he was receiving military retirement in the amount of \$3960 per month in addition to VA disability payments in the amount of \$1900 a month. He also received \$150 to \$250 a month playing in a band. Husband's disposable income therefore was just under \$4000, after paying Wife \$2000 a month.

¶ 5 On October 28, 2014, the court entered a judgment for dissolution of marriage. According to the judgment of dissolution, Husband was to pay Wife one-half of his gross retirement pay, or \$1980 a month. In addition, Husband was to pay Wife the difference between any money she would lose were Husband to opt for VA benefits, or anything else he might do to reduce Wife's share of Husband's pension. Both parties were also barred from attempting to claim maintenance or alimony from the other.

¶ 6 Husband timely filed a motion for rehearing, retrial, modification of judgment, or other relief seeking additional oral arguments and additional evidence to be entered regarding his retirement benefits and monthly income. Husband argued that part of his military pension consisted of disability monies that were not subject to division by the court pursuant to the Uniformed Services Former Spouses' Protection Act. See 10

U.S.C. § 1408 (2000). The parties subsequently entered into an agreement that Husband's child support obligation would be modified, but all other terms and provisions of the October 2014 judgment were to remain in full force and effect. The court entered an order on January 29, 2015, incorporating the parties' agreement, and specifically noting that the agreement resolved all issues in Husband's postjudgment pleading. Husband did not appeal from this order.

¶ 7 On April 21, 2015, Wife filed a petition for rule to show cause against Husband alleging he had failed to make appropriate child support payments and/or retirement benefit payments as required by the October 28, 2014, judgment that remained in full force and effect, except as modified by the January 29, 2015, order. Husband responded that his disposable retirement pay was only \$3241.97 because of certain deductions now being made for health insurance coverage and taxes. On July 22, 2015, another order was entered by agreement lowering Wife's portion of Husband's military pension to \$1609.84 per month. Husband did not appeal or file a motion to reconsider this order.

¶ 8 On November 13, 2015, Wife filed a motion to enforce, alleging that Husband failed to make the appropriate military pension payments as required by the July 22, 2015, order. At the hearing on the motion to enforce, Husband argued that part of the \$1609.84 he was required to pay was disability. According to Husband, one-half of his military pension was slightly over \$500 a month, and he therefore was not required to pay Wife an additional \$1000 to \$1100 a month. The court enforced the July 22, 2015, order that had been entered into by agreement of the parties, and which Husband had not appealed. Husband was again ordered to pay \$1609.84 per month to Wife. The court

entered its written order on April 22, 2016. It is this order from which Husband now appeals.

¶ 9 The Uniformed Services Former Spouses' Protection Act (Act) (10 U.S.C. § 1408 (2000)) authorizes state courts to treat as community property “disposable retired or retainer pay.” Section 1408(a)(4)(B) specifically defines such pay to exclude any military retirement pay waived in order for the retiree to receive veterans' disability benefits. Accordingly, state courts may not treat as divisible property upon divorce any military retirement pay waived by the retiree in order to receive veterans' disability benefits. See *Mansell v. Mansell*, 490 U.S. 581, 583 (1989); *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 159, 838 N.E.2d 282, 295 (2005).

¶ 10 Husband contends on appeal that \$2210.47 of his retirement pay is attributable to disability payments, which are not dividable as part of any property distribution or classifiable as disposable income. He therefore argues Wife is entitled to 50% of his retirement, exclusive of any amounts attributable to his disability award. While this may be true, Husband ignores two other factors that come into play in this instance. First, Husband never appealed the original judgment awarding Wife one-half of his pension, nor did Husband appeal any subsequent order on the basis that a large portion of his retirement pay was attributable to disability payments. Husband was the one who supplied the court with his retirement pay figures. Husband is the one who withdrew his motions to change the amount of support and/or chose not to pursue his arguments that a large portion of his retirement benefits could not be used in calculating the amount of support Wife could receive. More importantly, Husband is the one who agreed to pay

Wife \$1609.84 per month in support under the parties' agreement incorporated by the court in its July 22, 2015, order. Again, Husband did not appeal this agreed-to amount. A party can agree to pay more than is allowable under any statute. He cannot be forced to do so, but he can voluntarily choose to do so. See *In re Marriage of Nielsen*, 341 Ill. App. 3d 863, 869-70, 792 N.E.2d 844, 849 (2003) (former husband could not unilaterally diminish former wife's interest under settlement agreement in his military pension by electing to waive a portion of his retirement pay to obtain veteran's disability payments); *Bergheger v. Boyle*, 258 Ill. App. 3d 413, 417, 629 N.E.2d 1168, 1171 (1994) (persons may, by agreement, exclude the operation of law and determine themselves what rights they will have in each other's property during marriage); *In re Marriage of Marshall*, 166 Ill. App. 3d 954, 961, 520 N.E.2d 1214, 1219 (1988) (pension provision in dissolution agreement between the parties was enforceable as a contractual term regardless of preemptive status of Act). See also *In re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 269, 794 N.E.2d 980, 986 (2003) (anti-alienation rule of Social Security Act invalidated provision of marital settlement agreement treating future benefits as marital property as opposed to maintenance). This is what Husband did. He agreed to a support figure in excess of what he was required to pay under the Act. These agreements were incorporated into the court's orders and were not appealed. The argument Husband now makes is an argument he waived in prior court proceedings, and in entry of agreed-to orders that were never appealed. The issue, having already been addressed, can no longer be raised on appeal. See *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 656, 913

N.E.2d 1077, 1090 (2009). We therefore affirm the judgment of the circuit court of Marion County as entered on July 22, 2015.

¶ 11 Affirmed.