

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DONNA JEAN SCHULTZ, f/k/a  
DONNA JEAN MICHALSKI,

UNPUBLISHED  
September 19, 1997

Plaintiff-Appellee/Cross-Appellant,

v

No. 169937  
Bay Circuit Court  
LC No. 82-007477-DM

THOMAS MICHALSKI,

Defendant-Appellant/Cross-Appellee.

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Before: O'Connell, P.J., and Smolenski and T. G. Power\*, JJ.

PER CURIAM.

In this post-judgment of divorce action, defendant Thomas Michalski appeals as of right a September, 1993, order granting summary disposition in favor of plaintiff Donna Jean Schultz, formerly known as Donna Jean Michalski. We affirm in part, remand in part and retain jurisdiction. The question of taxable costs pursuant to MCR 7.219 is reserved until after remand.

Plaintiff cross-appeals as of right the same order. We affirm. Plaintiff, having not prevailed, may not tax costs pursuant to MCR 7.219.

**Defendant's Appeal**

Defendant first argues that the trial court abused its discretion in denying his motion to reconsider the entry of a Qualified Domestic Relations Order (QDRO) that included a provision providing plaintiff with survivorship benefits in defendant's pension. We review a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

In this case, both the trial court's original written opinion concerning the division of property as well as the judgment of divorce essentially provided that plaintiff receive a share of defendant's pension

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\* Circuit judge, sitting on the Court of Appeals by assignment.

when it is received by defendant. Thus, the opinion and judgment cannot be interpreted as awarding plaintiff survivorship rights in defendant's pension. *Roth v Roth*, 201 Mich App 563; 506 NW2d 900 (1993). However, the trial court entered a QDRO that included a provision providing plaintiff with survivorship benefits in defendant's pension. Thus, the trial court effectively modified the property settlement provisions of the judgment of divorce.

Generally, the property settlement provisions of a divorce judgment are final and, as a general rule, cannot be modified. *Tomblinson v Tomblinson*, 183 Mich App 589, 594; 455 NW2d 346 (1990). However, as with all final judgments, a party may seek relief from the property settlement provisions of the divorce judgment under MCR 2.612(C). For example, if relief is sought under MCR 2.612(C)(1)(f), such relief will be granted only where the substantial rights of the opposing party are not detrimentally affected and where extraordinary circumstances exist. *Tomblinson, supra* at 594-595. "A trial court's decision concerning subrule (f) is discretionary and will not be disturbed absent a clear showing of an abuse of discretion." *Id.* at 595.

In this case, we are unable to determine from the record whether the trial court intentionally or knowingly modified the judgment of divorce and its reasoning therefore. Accordingly, we are unable to determine whether the trial court abused its discretion in modifying the judgment of divorce to award plaintiff survivorship rights in defendant's pension and, therefore, whether the trial court abused its discretion in denying defendant's motion for reconsideration. Accordingly, we remand and retain jurisdiction. On remand, the trial court shall state its reasoning for modifying the property settlement portion of the judgment of divorce to provide plaintiff with survivorship benefits in defendant's pension. The trial court shall complete further proceedings consistent with this opinion within sixty days.

Next, defendant contends that the trial court improperly considered defendant's monthly Social Security Disability Insurance (SSDI) benefit when the court determined the amount of plaintiff's formulaic monthly share of defendant's pension benefit received from General Motors Corporation (GM). We disagree. The record indicates that GM applies the amount of defendant's SSDI benefit as a setoff against defendant's pension entitlement, thereby reducing accordingly the amount of its monthly payment to defendant. The trial court simply determined that the formula for determining plaintiff's share of defendant's GM pension payment should be applied as contemplated by the original divorce judgment, i.e., to the full value of defendant's GM entitlement, without regard for GM's setoff arising from defendant's concurrent SSDI benefit. We are not left with the firm conviction that the trial court's ruling in this regard was inequitable. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

Next, defendant contends that the trial court erred in ordering that plaintiff be maintained as a beneficiary of his life insurance policy where defendant has now begun drawing his pension. We find no error. A May, 1993, order provides in relevant part as follows:

C. Defendant shall immediately name Donna Schultz as the sole beneficiary of his life insurance through General Motors *pending resolution of payment to Plaintiff of Defendant's pension benefits*. [(emphasis added).]

Contrary to defendant's assertion, this provision reflects the understanding of the parties below, i.e., that defendant will maintain plaintiff as the beneficiary of his life insurance *until plaintiff begins receiving her portion of defendant's pension*. Defendant has not argued or established that this order is not still in effect. The subsequent September, 1993, order from which defendant appeals simply orders that plaintiff "shall continue to be a named beneficiary on the Defendant's life insurance for the maximum life insurance benefit of \$35,000." Defendant has not argued or established that the September, 1993, "continuation" order somehow modifies the limitation in the May, 1993, order that plaintiff will remain a beneficiary only until such time as plaintiff begins receiving pension benefits. Although the record is not clear concerning whether plaintiff has begun receiving pension benefits, at such point defendant can certainly move the trial court to have plaintiff removed as a beneficiary of his life insurance policy pursuant to the May, 1993, order. Accordingly, we find no error. Moreover, in light of these orders, we likewise reject defendant's argument that the court erroneously ordered that plaintiff be maintained as a beneficiary of his life insurance policy *even after she receives her portion of defendant's pension*.

In summary, we affirm in part, and remand in part and retain jurisdiction. The question of taxable costs pursuant to MCR 7.219 is reserved until after remand.

#### Plaintiff's Cross-Appeal

On cross-appeal, plaintiff argues that in limiting to \$35,000 the amount of insurance coverage she was to enjoy, the trial court improperly modified the divorce judgment. We disagree. It is true that the divorce judgment did not specifically limit the amount of coverage to which plaintiff was entitled:

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, Thomas Michalski, shall keep and maintain Plaintiff, Donna Jean Michalski, as his sole beneficiary on his policy of life insurance provided for him by his employer, General Motors.

However, the trial court's original written opinion concerning the division of property provided, in relevant part, as follows:

In other words, he receives a coverage on his life presently in the amount of \$35,000 so long as he is working at General Motors. He is to keep the wife as his beneficiary of that policy.

In providing in the September, 1993, order that defendant maintain plaintiff on his life insurance to a maximum of \$35,000, the trial court reasoned that if the amount of defendant's life insurance coverage

has increased, then it would be analogous to the number of years Mr. Michalski has worked in General Motors increasing his pension after the judgment of divorce, which Miss Schultz would have - or not be entitled to. And the Court finds it similar, therefore, that any increase in the life insurance, Mr. Michalski - it would be Mr.

Michalski's sole and separate property, and he can do with it what he wants and name his own beneficiary.

In light of this reasoning, we are not left with the firm conviction that the court's ruling concerning the amount of life insurance coverage to which plaintiff was entitled was clearly erroneous or inequitable. *McDougal, supra*.

Finally, plaintiff contends that the trial court erred when it denied her request for attorney fees because it was defendant's "needless actions" that caused her to incur the expenses associated with this litigation.

In a divorce action, attorney fees are not recoverable as of right. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Rather, attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend the action. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Attorney fees may also be awarded when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Id.* See also *Stackhouse, supra*. This Court will not reverse a trial court's decision to award attorney fees absent an abuse of discretion. *Hanaway, supra*. Generally, the trial court should make specific findings concerning the necessity of a fee. *Stackhouse, supra* at 446. However, even where the trial court failed to make the requisite findings, this Court has affirmed an award of attorney fees in a divorce action where sufficient record evidence existed to support the necessity of the fee award. *Id.* at 445-446.

In its bench opinion in this case, the trial court stated as follows concerning plaintiff's request for attorney fees:

The one thing I didn't cover is attorney fees and costs. In lieu (sic) of my opinion regarding this whole matter and the circumstances, the Court's gonna deny attorney fees and costs.

The trial court's findings certainly could have been more explicit. However, the record indicates that this litigation was precipitated by legitimate legal disputes between the parties concerning the nature of defendant's benefit payments from GM and the time plaintiff would become entitled to a share thereof. Accordingly, we find no abuse of discretion in the trial court's denial of plaintiff's attorney fee request. *Hanaway, supra*.

In summary, we affirm. Plaintiff, having not prevailed, may not tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

Judge Thomas G. Power not participating.