

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET M. KEANE,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 201912

Kalamazoo Circuit Court

IBM PENSION PLAN,

LC No. 95-002051 CZ

Defendant-Appellee.

Before: Cavanagh, P.J, and Murphy and White, JJ.

WHITE, J. (dissenting).

I respectfully dissent. The circuit court did not sufficiently address plaintiff's claims, and the record is inadequate to conclude that defendant is entitled to dismissal of plaintiff's claims as a matter of law. I would remand for further proceedings.

Acknowledging that the QDRO was inartfully drafted,¹ I conclude that it was sufficiently ambiguous regarding what plaintiff was awarded as an accrued benefit, and whether it contemplated that plaintiff's share, if to be determined by reference to a future benefit, would be divided and segregated for her benefit, rather than tied to a future benefit without regard to the time the benefit was actually received, to create genuine issues of material fact requiring further exploration. Further, plaintiff raised a genuine issue regarding the adequacy of defendant's response to her claim for increased benefits under the plan.

The QDRO first purports to award plaintiff 50% of her ex-husband's accrued benefit under the plan as of November 18, 1985. It then purports to define the accrued benefit under the plan as of that date as the benefit the participant would receive if he terminated participation in the plan on November 18, 1985 and commenced annuity benefit payments at normal retirement age.² However, the provision is ambiguous because it appears that the participant/ex-husband's accrued benefit under the plan as of November, 18, 1985 was not an annuity commencing at normal retirement age.³ Rather, the participant was eligible for early retirement, and it further appears that the actuarial value of that accrued benefit was not the equivalent of the value of the benefit commencing at normal retirement age reduced by an early retirement factor, because the participant had sufficient years of service to be entitled to a

calculation that reduced the benefit not from normal retirement age, but an earlier date reflecting 28 years of service at the time of the divorce.

The QDRO also provided that if the benefit was required to be paid in a form other than commencing at the participant's normal retirement date, the benefit paid would be a benefit that is actuarially equivalent under the plan's actuarial assumptions to the assigned benefit, (defined by reference to an annuity commencing at the participant's normal retirement date). Lastly, the QDRO provided that plaintiff could elect to commence benefits at any time on or after the date participant could elect to commence benefits under the plan (immediately).

Plaintiff complains, in essence, that she has been deprived of the increased value of her share of the retirement benefit that accrued simply by the passage of time, as distinguished from the increase in value attributable to the plan participant's continued employment. Plaintiff's exhibits show that her benefit was frozen in time, while the participant's benefit increased substantially. Defendant has computed plaintiff's benefit in this fashion by relying on the language that ties the benefit to the amount the participant would receive assuming the commencement of benefits at normal retirement age. Plaintiff argues that the QDRO contemplated that that amount would be determined as of the date of the divorce, and then separated and segregated for her benefit. She would then be entitled to the actuarial equivalent of that benefit at any time she elected to commence receiving benefits. The actuarial equivalent would grow with the passage of time, based on plaintiff's survival and the fact that the commencement date was less far in the future. The record does not provide a great deal of insight into how defendant actually computed plaintiff's and the participant's benefits under the plan, other than that it appears that the participant's benefit at retirement was calculated, plaintiff's 50% as of 1985 was subtracted, and the participant was awarded the balance. It is unclear whether the substantial growth in the participant's benefit is due to his increased earnings, additional service, the passage of time, or a combination of the three. I believe plaintiff's claims are not properly dismissed without a clear answer to this question.

Although the circuit court correctly observed that the QDRO did not expressly provide for the accrual of interest on plaintiff's benefit⁴ or that plaintiff would be awarded the actuarial equivalent of 50% of the accrued pension value at the time of divorce, plaintiff correctly points out that the QDRO as a whole can be read as contemplating that plaintiff's benefit would be fixed at the time of the divorce and available to her at her election, which would require some segregating and current vesting of her share of the benefit, while defendant's approach seems to contemplate that plaintiff's right to receive half of the accrued benefit would not have measurable value to be segregated until actually drawn, but would be fixed in time and value as of November 1985 date.

The QDRO orders defendant to assign and pay 50% of the accrued benefit to plaintiff, albeit in a form that is tied to receipt at the participant's normal retirement age. The paragraph that provides that if the benefit is to be paid other than in the form of an annuity beginning at the participant's normal retirement age, it is to be actuarially equivalent to the assigned benefit, is silent regarding the time of valuation. Defendant has interpreted the various provisions as meaning that plaintiff's right is fixed as of November 1985, and the actuarial equivalent is fixed as of that time too in the sense that the right that is

valued is the right in 1985 to receive a stream of payments the amount of which is fixed in 1985, and the entitlement to which will not commence until normal retirement age, assuming survival to that time. Plaintiff would read the provision as calling for the computation of the actuarial equivalent of the right as valued in 1985 as of the time actually drawn. Under plaintiff's interpretation, the actuarial equivalent in 1992, when the pension was drawn, would have been greater due to the passage of time.

Acknowledging that when all the information comes to light regarding the plan's provisions, its actuarial assumptions and usual methods of calculating benefits, the actuary's opinions, and the divorcing parties' intent,⁵ defendant's position may prove to be correct, I would, nevertheless, reverse and remand for further proceedings to enable adequate discovery and development of the record. Plaintiff should be required to join her ex-husband in the action because the outcome may affect his pension benefits.

/s/ Helene N. White

¹ The QDRO defined the accrued benefit by reference to a formula that did not account for the participant's accrued early retirement rights. Moreover, the formula did not make use of the fractional approach which would have awarded plaintiff 50% of a fraction of the participant's benefit, the numerator of which would be the years of service at the time of the divorce and the denominator of which would be the total years of service at retirement.

² There is no copy of the plan in the record. It appears that the normal retirement age is 65.

³ In a trial court filing, plaintiff argued by analogy that if a will purported to leave a bequest of "one dollar, being two quarters," the bequest would be satisfied by one dollar bill or four quarters, notwithstanding the erroneous reference to two quarters.

⁴ This would probably be inconsistent with the plan in any event because it is a defined benefit plan.

⁵ While the QDRO is indeed an order, it was the product of stipulation, and an effort to implement the divorce judgment. Intent is therefore relevant.