

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA F. MCPHERSON,
Plaintiff-Appellee,

UNPUBLISHED
July 9, 2002

v

MILTON G. MCPHERSON,
Defendant-Appellant.

No. 228400
Wayne Circuit Court
LC No. 93-307067-DM

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

MEMORANDUM.

Defendant appeals by leave granted from an amended qualified domestic relations order (QDRO) entered by the circuit court. We reverse and remand.

The parties entered into a consent judgment of divorce that granted plaintiff a share of defendant's pension benefits for a limited time. The parties intended to effectuate the judgment through a QDRO, but defendant's employer rejected the QDRO because it conflicted with ERISA. The trial court entered an amended QDRO that conformed to the requirements of ERISA but conflicted with the terms of the judgment.

A consent judgment is the product of an agreement between the parties. *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990). A consent judgment is in the nature of a contract and is to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). In general, such judgments are final and binding upon the court and the parties and cannot be modified absent fraud, mistake or unconscionable advantage. *Staple v Staple*, 241 Mich App 562, 564; 616 NW2d 219 (2000); *Walker v Walker*, 155 Mich App 405, 406-407; 399 NW2d 541 (1986).

The plain language of the consent judgment extinguished plaintiff's right to defendant's pension benefits unless he retired before age sixty-two, in which case she was limited to thirty-five percent of his benefits from the date of retirement until defendant reached age sixty-two, at which time her right to such benefits would terminate. As indicated in the original QDRO, the parties apparently intended that any benefits to which plaintiff was entitled should survive her death but she was not entitled to defendant's benefits should he predecease her. The trial court correctly interpreted the language of the judgment, but refused to enforce it.

The amended QDRO clearly altered the judgment by granting plaintiff a share of defendant's pension benefits beyond the time agreed to even though there had not been any allegation, showing or finding that the provision for limited benefits was the product of fraud, mistake, or unconscionable advantage. The only mistake was that the agreement could not be enforced through a QDRO as intended. The negotiated terms of the divorce judgment should not be altered to accommodate the QDRO when the purpose of the QDRO was to effectuate the terms of the judgment. "To hold otherwise would violate the binding divorce judgment as well as the equitable principles upon which divorce actions are based." *Walker, supra*. Accordingly, we reverse the trial court's order and remand for a determination of the appropriate means for effectuating the terms of the judgment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff