STATE OF MICHIGAN

COURT OF APPEALS

STEWART L. GINGRICH,

Plaintiff-Appellee,

v

JOAN E. VANDERWERP,
f/k/a JOAN E. GINGRICH,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 226039
Macomb Circuit Court
LC No. 91-000610-DO

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying reconsideration of its earlier opinion and order holding that the parties did not intend to include cost of living adjustment (COLA) increases in defendant's share of plaintiff's pension subsequent to the February 11, 1991, termination of the parties' marriage. We affirm.

In a prior appeal, this Court affirmed by divided opinion an amended qualified domestic relations order (QDRO) entered on September 27, 1994, which included COLA increases subsequent to the termination of the parties' marriage. *Gingrich v Vanderwerp*, unpublished opinion per curiam of the Court of Appeals, issued August 29, 1997 (Docket No. 185495). On June 29, 1998, our Supreme Court entered an order reversing this Court's decision and remanding the matter to the trial court "for the reasons stated in the dissenting opinion of Judge Kelly," who concluded that the amended QDRO unilaterally revised the parties' original agreement. 458 Mich 852 (1998). Following an evidentiary hearing on remand, the trial court determined that the parties did not intend to include COLA increases in defendant's portion of plaintiff's pension subsequent to February 11, 1991.

Findings of fact in a divorce case are reviewed under the clearly erroneous standard. *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). A finding is clearly erroneous if, after reviewing the entire record, the reviewing court is left with the firm conviction that a mistake has been made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). In general, judgments, including consent judgments, are final and binding. *Staple v Staple*, 241 Mich App 562, 564-565; 616 NW2d 219 (2000). Public policy demands finality of litigation in the area of family law to preserve surviving family structure. *Id.*

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

Property settlement provisions in a divorce judgment are typically final and cannot be modified by the court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties. *Id.*

In *Quade*, a judgment of divorce awarded the wife fifty percent of the husband's pension, transferred by way of a QDRO, effective the date of the judgment, "including interest, dividends, etc." *Id.* at 223. The wife argued that the judgment of divorce awarded her fifty percent of the defendant's entire retirement package, and, because early retirement benefits are part of the pension package, she should be entitled to a share of the early retirement benefits that were based on service credit accrued during the marriage. This Court disagreed, noting that separate and distinct components of pension plans must be specifically awarded in a judgment of divorce in order to be included in a QDRO. *Id.* at 224.

In *Quade*, the wife further argued that, although early retirement benefits were not vested at the time of the divorce, they could still be part of the marital estate if just and equitable pursuant to MCL 552.18(2), which provides, in part:

> Any rights or contingent rights in and to unvested pension, annuity, or retirement benefits payable to or on behalf of a party on account of service credit accrued by the party during the marriage may be considered part of the marital estate subject to award by the court under this chapter where just and equitable.

This Court found that, while early retirement benefits may be awarded under this statute, absent a specific provision in the judgment of divorce, it could not conclude that the parties intended to include those benefits. *Id.* at 225. Finding no fraud, duress, or mutual mistake, this Court declined to alter the judgment of divorce to include the specific provision of early retirement benefits in addition to the wife's general pension award. This Court also noted that the judgment of divorce stated that each party had waived "except as specifically provided herein" all interest in any IRA, pension or profit sharing plan in which the other may have an interest. *Id.* at 226.

In the instant case, the May 11, 1992, judgment of divorce provides, in pertinent part:

> P. Each party shall be awarded, unless specified otherwise herein, their respective pensions. . . *free and clear of any claim of right, title or interest of the other party*.
>
> Q. Plaintiff shall. . . provide for direct monthly payments to defendant of 50% of his disposable retired pay, *subject to its value on February 11, 1991*. . . [Emphasis added.]

We conclude that the trial court did not err in finding that, pursuant to the judgment of divorce, COLA and rank increases which arose subsequent to February 11, 1991, were not subject to division by the court. Moreover, the trial court's factual finding that the parties did not intend to include COLA and rank increases is not clearly erroneous. *Stoudemire*, *supra.* Defendant testified that she was aware both before and during her marriage that plaintiff's pension was subject to COLA. Her testimony that she thought the judgment allowed for COLA does not

constitute a mutual mistake sufficient to permit this Court to alter the judgment of divorce. *Quade, supra.*

Plaintiff's claim that she did not agree to a sum certain, as appears in the February 1, 2000, QDRO is without merit. Her own expert testified that a percentage of a dollar amount is a dollar amount, and that if he had prepared the QDRO solely on the basis of the judgment of divorce, without having talked to defendant, her monthly portion would not include COLA, and would have been a dollar amount slightly in excess of twelve hundred dollars.

Finally, defendant's claim that an award of a percentage of a pension should include all parts of that pension was rejected by this Court in *Quade* and, in any event, is more properly addressed to the Legislature.

Affirmed.

Peter D. O'Connell
Barbara B. MacKenzie