

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHELE A. ERWAY,

Plaintiff-Appellee,

v

PHILLIP L. ERWAY,

Defendant-Appellant.

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UNPUBLISHED  
February 27, 2007

No. 265194  
Saginaw Circuit Court  
LC No. 00-031959-DM-1

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's decision to enter a Qualified Domestic Relations Order (QDRO) awarding plaintiff fifty percent of any early retirement benefits defendant might receive under his employer's pension plan. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

After twenty-three years of marriage, plaintiff filed for divorce from defendant in January of 2000. Following a bench trial, the trial court entered a judgment of divorce, ending the marriage and dividing the parties' property. The judgment awarded plaintiff fifty percent of defendant's "pension valued from the date of the marriage to the filing of the Complaint for Divorce." Plaintiff then presented a proposed QDRO giving her an interest in both the pension and defendant's potential early retirement benefits. The trial court entered the QDRO over defendant's objections and the instant appeal followed.

On appeal, defendant argues that, under *Quade v Quade*, 238 Mich App 222; 604 NW2d 778 (1999), early retirement supplements are separate and distinct components of pension plans that must be specifically awarded in a judgment of divorce in order to be included in a QDRO. Because the judgment in the instant case did not award plaintiff such benefits, the trial court erred by including them in the QDRO.

When reviewing a trial court's property division in a divorce case, we first examine the trial court's findings of fact. *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003). If the trial court's findings of fact are upheld, we must then determine "whether the dispositive ruling was fair and equitable in light of those facts." The dispositional ruling is discretionary with the trial court and should be affirmed unless we are "left with the firm conviction that the division was inequitable." *Id.*, 423.

Pensions are part of the marital estate and subject to distribution upon divorce. *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996). Under MCL 552.18(1), a trial court must include a party's vested right to any pension or retirement benefits that accrued during the marriage in the marital estate. Any rights or contingent rights to unvested pension or retirement benefits may be considered part of the marital estate and be subject to award by the court where just and equitable. MCL 552.18(2); *Baker v Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005).

In *Quade*, the parties reached a property settlement agreement and the trial court entered a consent judgment of divorce dissolving their marriage. The judgment awarded the plaintiff fifty percent of the defendant's pension with rights of survivorship. 238 Mich App at 223. The trial court entered a QDRO transferring rights in the pension, but excluded language granting the plaintiff a share of the defendant's early retirement benefits because they were not specifically granted to the plaintiff in the judgment of divorce. *Id.* On appeal, this Court noted that it had previously held 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.*, 224, citing *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993). Early retirement benefits are one such separate and distinct component. *Id.* This Court further stated that, although early retirement benefits may be considered part of the marital estate under MCL 555.18(2), the judgment of divorce did not provide for such an award. *Id.*, 225. It then held:

The parties could have added a provision for early retirement benefits in the judgment of divorce just as they did for the rights of survivorship. Moreover, because there is handwritten language in the alimony section that contemplates that defendant may take an early retirement, it would appear that the parties discussed the possibility of early retirement during settlement negotiations. Absent a specific provision in the judgment of divorce, we cannot conclude that *the parties intended to include early retirement benefits as part of plaintiff's property settlement.* [*Id.* (emphasis added).]

The parties in the instant case did not agree to a consent judgment. They agreed that plaintiff should receive half of defendant's general pension benefits, but a dispute remained as to whether she should also receive a portion of his early retirement benefits. Although defendant does not have a vested right to such a supplement, under MCL 552.18(2) the trial court could consider it part of their marital estate subject to division. See *Quade, supra*, 225. When resolving this issue in its opinion, the trial court merely stated that "any pension rights acquired during the marriage" were to be split equally. The judgment of divorce similarly awarded plaintiff fifty percent of defendant's pension with out specifying whether this was to include half of any early retirement supplement.

Plaintiff sought to have the trial court enter a QDRO that would give her a fifty percent interest in both defendant's pension and any early retirement supplement he might receive. When defendant objected, the trial court stated that it had intended, when ruling on the parties property division, to award plaintiff an interest in both. Unlike the court in *Quade*, the trial court was not attempting to discern from the wording of a judgment of divorce whether the parties intended to include early retirement benefits in their settlement agreement. Rather, the trial court clarified its own dispositional ruling.

The original judgment of divorce did not grant plaintiff both pension and early retirement benefits. Under *Quade*, these separate and distinct components of a pension plan must be specifically awarded in a judgment of divorce in order to be included in a QDRO. But the trial court ordered the entry of an amended judgment of divorce specifying that plaintiff was to receive fifty percent of each component. As plaintiff correctly contends, under MCR 2.612(A)(1), the trial court has the power to correct “[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission.” See *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998), holding that the purpose of MCR 2.612(A)(1) is to make the lower court record and judgment accurately reflect what was done and decided at the trial level.

Because the trial court also ordered the entry of an amended judgment of divorce, we hold that it did not err in entering the proposed QDRO submitted by plaintiff.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder