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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2219
A11-683
A11-684

Patricia Ann Langston,
Respondent,

vs.

Wilson McShane Corporation,
as Administrator for the
Twin Cities Carpenters and Joiners Pension Fund, et al.,
Appellants.

Filed January 9, 2012
Reversed
Ross, Judge

Anoka County District Court
File No. 02-CX-07-001888

Thomas F. DeVincke, Bonner & Borhart LLP, Minneapolis, Minnesota (for respondent)

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Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Patricia Langston obtained a 2005 domestic relations order from the district court to enforce her rights to her portion of the marital share of her ex-husband's retirement benefits, based on the 1993 judgment dissolving their marriage. By then, her ex-husband had already remarried, retired, and begun receiving benefit payments based on his election of survivor benefits with his extant spouse, not Patricia, as the surviving beneficiary. Wilson McShane Corporation, the administrator of the plan directing the benefits, determined that the domestic relations order was not "qualified" under ERISA. Patricia's ex-husband soon died and his widow began receiving the surviving-spouse benefits. Patricia sought a declaratory judgment against McShane, requiring it to treat the domestic relations order as qualified and to pay benefits to her under it. The district court held that the domestic relations order was qualified, and it awarded summary judgment to Patricia and ordered McShane to pay her attorney fees. Because the district court erred by declaring the domestic relations order to be "qualified" under ERISA and it abused its discretion by awarding attorney fees, we reverse.

FACTS

The facts are not disputed. Patricia and Gary Langston married in 1964. Gary Langston was a carpenter and a participant in the Twin Cities Carpenters and Joiners Pension Fund (the Plan), a multiemployer defined benefit plan established and administered in accordance with the provisions of the Employee Retirement Income Security Act (ERISA). Wilson McShane Corporation is the Plan's administrator.

Patricia and Gary Langston divorced in 1993. The judgment and decree awarded Patricia a one-half interest in future pension payments received by Gary and, if Gary's plan allowed him to elect survivor benefits, it required him to elect survivor benefits and name Patricia as the beneficiary in the event of his death. The Plan provided that if Gary's marital status changed and it affected his beneficiaries, he should contact the Plan. The Plan also provided that a participant's spouse was automatically the surviving beneficiary unless the participant changed that by an express designation otherwise. The Plan never received a copy of the Langstons' judgment and decree and it was unaware of Gary's obligation to Patricia under it. Eight years after the divorce, Gary married Shelly James, and three years after their wedding, Gary retired. At no time before Gary's retirement did Patricia seek a qualified domestic relations order informing or directing the Plan to treat her as the surviving spouse or to assign any portion of Gary's eventual pension payments to her according to the terms of the judgment and decree.

When Gary retired in 2004, he applied to receive benefits from the Plan. He elected a 50% qualified joint and survivor annuity and designated Shelly, his extant wife, as the surviving annuitant. Under this option Gary would receive $2,825.63 for the remainder of his life, and, if he predeceased Shelly, Shelly would receive $1,412.81 monthly (50% of the amount Gary was receiving) for the remainder of her life. The Plan provided that an election was revocable only in writing during the 90-day election period that begins when a participant receives notice of his right to waive the joint and survivor annuity benefit. One month later in July 2004, Gary's application was approved and the Plan began paying him benefits.

In July 2005, 12 years after her divorce from Gary and 4 years after his remarriage, Patricia sought and obtained a domestic relations order (DRO) from the district court to secure a portion of the marital share of Gary's retirement benefits based on the judgment and decree. The DRO identified Patricia as the alternate payee and assigned her 50% of the retirement benefits otherwise payable to Gary derived from his accrued vested benefit accumulated from September 5, 1964, through August 3, 1993. The DRO also provided that the accrued benefit under the order was to be paid to Patricia

> in the form of an annuity payable over her lifetime with monthly payments commencing when [Gary] reaches or would have reached his earliest retirement age under the Plan. The amount of these monthly payments shall be determined by applying the Plan's actuarial assumptions to the amount of the accrued benefit assigned to [Patricia] under paragraph (d) above. In the event that [Gary] dies before payments to [Patricia] begin, [Patricia] shall be considered the "surviving spouse" of [Gary] for purposes of section 205 of the Employee Retirement Security Act of 1974, . . . Survivor benefits, if any, shall commence to [Patricia] at the earliest time permitted by the Plan for payment to a surviving spouse.

When the Plan received the DRO the next month, it reviewed it to determine whether it was "qualified" under ERISA. *See* 29 U.S.C. § 1056(d)(3)(G) (2006). The Plan notified Patricia by letter on August 18, 2005 that it had determined that the DRO was not qualified, and it stated its reasons:

> The Order provides for payments to be made in the form of an annuity payable over [Patricia's] lifetime. Normally this would be appropriate. However, benefits to [Gary] are already in pay status due to [his] retirement. In addition he remarried prior to retirement and elected to receive his accrued benefits in the form of a joint and survivor annuity, with death benefits payable to his current spouse. Thus, the only appropriate method for assigning benefits at this point is

> the shared payment method. Under this approach, [Patricia] will be entitled to receive 1/2 of the monthly benefits payable to [Gary] through the earlier of her death or [Gary's] date of his death. She would not be entitled to any survivor benefit in the event she were predeceased. Paragraph "E" of the Order should be revised to reflect this.

The Plan began to set aside $381.38 per month from payments to Gary on the possibility that Patricia would obtain an order modifying and qualifying the DRO. In October 2005, Gary died. The Plan immediately began paying survivor benefits to Gary's surviving wife, Shelly.

Patricia moved the district court in the dissolution action to require McShane to follow the 2005 DRO. The district court denied the motion for its lack of jurisdiction in that matter over McShane or the Plan.

Patricia later filed a civil complaint against McShane and the Plan seeking a declaratory judgment that the 2005 DRO was qualified under ERISA and that she was entitled to payments under it. She also sought an award of costs and attorney fees. McShane did not answer and the district court entered a default judgment in Patricia's favor. McShane moved the district court to vacate the default judgment, and the district court denied the motion. McShane appealed, and this court reversed the district court and held that the district court lacked subject-matter jurisdiction to decide whether a DRO qualified under ERISA, construing the issue to be a federal question limited to exclusive federal-court jurisdiction. *Langston v. Wilson McShane Corp.*, 758 N.W.2d 583, 590 (Minn. App. 2008). The Minnesota Supreme Court reversed our decision, holding that state and federal courts have concurrent subject-matter jurisdiction to review a plan

administrator's determination of whether a domestic relations order is qualified under ERISA. *Langston v. Wilson McShane Corp.*, 776 N.W.2d 684, 693 (Minn. 2009). The supreme court remanded the case to the district court for a decision on the merits. *Id.*

Patricia moved the district court for summary judgment, arguing that the 2005 DRO entitled her to receive her share of Gary's pension as required under the 1993 dissolution judgment. The district court granted Patricia's motion for summary judgment and held that the DRO was qualified and that the Plan must immediately begin paying surviving-spouse benefits to Patricia.

The various district court decisions culminated in the three appeals now before us. In granting Patricia's motion for summary judgment, the district court engaged in a lengthy analysis addressing McShane's defense that Shelly's interest in the survivor benefits had irrevocably vested on Gary's retirement. The district court reasoned that Minnesota courts should adopt the holding of Hawaii's supreme court in *Torres v. Torres*, 60 P.3d 798 (Haw. 2003). The *Torres* court held that an extant spouse's right to joint and survivor benefits does not irrevocably vest at the moment the participant spouse retires. *Id*. at 822. The district court preferred *Torres*'s reasoning over that of the United States Court of Appeals for the Fourth Circuit as stated in *Hopkins v. AT & T Global Information Solutions*, 105 F.3d 153 (4th Cir. 1997). The *Hopkins* court held that the extant spouse's benefits vest on the participant spouse's retirement. *Id*. at 156. The district court also determined that the DRO met the other terms for qualifying under 29 U.S.C. § 1056(d)(3)(D). The court reserved the issue of attorney fees. McShane appealed the order in December 2010. In February 2011, the district court issued an amended order

and memorandum. Then in March it awarded Patricia $55,692.50 in costs and attorney fees. In April, the district court issued another order entering judgment for the fees awarded to Patricia, and judgment was entered in May 2011. In April 2011, McShane had already appealed the February amended order and the March 7 award of attorney fees. We now resolve the three appeals altogether.

D E C I S I O N

I

We believe that the district court erred by granting summary judgment to Patricia because the DRO was not qualified. We review de novo a district court's grant of summary judgment based on the application of a statute to undisputed facts. *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

Congress designed ERISA to ensure the proper administration of employee benefit and pension plans. *See Boggs v. Boggs*, 520 U.S. 833, 839, 117 S. Ct. 1754, 1760 (1997). ERISA requires plans to offer a qualified joint and survivor annuity (QJSA) to its participants. 29 U.S.C. § 1055(a)(1) (2006). Under a QJSA, if the plan participant dies first, the surviving spouse is guaranteed at least 50% of the amount received by the participant while he was alive. 29 U.S.C. § 1055(d)(1) (2006). This is the form of retirement benefit that Gary elected and is at issue in this case.

The Langstons' 1993 judgment and decree directs the assignment or alienation of Gary's pension benefits. But ERISA provides that benefits under a pension plan "may not be assigned or alienated" except pursuant to a DRO that is "qualified," or literally, "a qualified domestic relationship order" (QDRO). 29 U.S.C. § 1056(d)(1), (3) (2006). A

QDRO is also exempt from ERISA's broad preemption of state law. 29 U.S.C. § 1144(b)(7) (2006). ERISA defines a DRO; it is

> any judgment, decree, or order (including approval of a property settlement agreement) which (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and (II) is made pursuant to a State domestic relations law.

29 U.S.C. § 1056(d)(3)(B)(ii). A DRO is qualified if it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(i). To be qualified it also must meet the requirements of the statute's subparagraphs (C) and (D). *Id.* Subparagraph (C) requires the order to specify four particulars:

> (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order, (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined, (iii) the number of payments or period to which such order applies, and (iv) each plan to which such order applies.

29 U.S.C. § 1056(d)(3)(C). And subparagraph (D) precludes a DRO from being "qualified" if it includes any of three prohibited requirements; a DRO can be qualified only if it:

> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan, (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and (iii) does not require the payment of benefits to an alternate payee which

> are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1056(d)(3)(D). An alternate payee is "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. § 1056(d)(3)(K).

When an alternate payee obtains a DRO, she must present it to the pension plan, which must, within a reasonable time, determine whether or not the DRO is qualified and notify the alternate payee and participant of its decision. 29 U.S.C. § 1056(d)(3)(g)(i). A party may challenge the qualification determination in a civil action in state or federal court. 29 U.S.C. § 1132(e)(1) (2006). To the extent the DRO is determined to be qualified the former spouse shall be treated as the plan participant's surviving spouse. 29 U.S.C. § 1056(d)(3)(F)(i).

We believe that the district court erred by holding that Patricia's DRO was qualified because the benefits had already irrevocably vested upon Gary's retirement. And because the benefits had already vested, the DRO would require the Plan to provide a benefit no longer available and to pay increased benefits because the Plan would have to pay both Shelly her 50% annuity and Patricia the benefits awarded under the DRO. These are prohibited requirements under section 1056(d)(3)(D).

We reach this conclusion by first determining whether the benefits were irrevocable and had vested in Shelly. This is an unsettled area of the law, but we are persuaded by the reasoning and holding in *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir.

2010). In *Carmona*, the Ninth Circuit addressed an issue very similar to ours—whether a participant to a QJSA can change the surviving-spouse beneficiary after the participant has retired and the annuity has become payable. *Id.* at 1047–48. The participant's eighth wife Janis sued the participant's ninth wife Judy, arguing that because she was the participant's spouse at the time of retirement she was the rightful surviving beneficiary, not Judy. *Id.* at 1048. Two years after the participant Lupe retired and began collecting benefits, he and Janis began divorce proceedings. *Id.* Lupe's pension plan would not revoke Janis's designation as a surviving beneficiary because the designation was irrevocable upon his retirement. *Id.* Nonetheless, a Nevada family court gave Lupe the pensions as his sole and separate property. *Id.* After Lupe married Judy, he petitioned the family court for a QDRO revoking Janis's designation as the surviving beneficiary of his pensions and to substitute Judy. *Id.* at 1049. Lupe later died. *Id.* Following his death, the family court issued the QDRO. *Id.* The Ninth Circuit agreed with Janis and held that for QJSAs, surviving-spouse benefits irrevocably vest in the participant's spouse at the annuity's commencement date (the date of retirement in that case) and cannot be reassigned to a subsequent spouse. *Id.* at 1048.

In reaching that conclusion, the *Carmona* court relied on the reasoning of *Hopkins v. AT & T Global Information Solutions Co. Id.* at 1057–58. In *Hopkins*, the Fourth Circuit held that benefits vest in the participant's extant spouse when the participant retires. 105 F.3d at 156. The participant's ex-wife had obtained a QDRO that enabled her to collect past-due alimony from his QJSA as an alternate payee and as his surviving spouse in place of his current spouse. *Id.* at 155. The *Hopkins* court held that because her

ex-husband's retirement created a vested interest in his surviving spouse, her DRO could never be qualified. *Id.* at 157.

The Ninth Circuit in *Carmona* gave four reasons for following the Fourth Circuit's rule in *Hopkins* that QJSA benefits vest in the participant's extant spouse on his retirement date in the case of QJSAs. These reasons persuade us also.

First, ERISA places great importance on the annuity start date for QJSA benefits. *Carmona*, 603 F.3d at 1057. Under 29 U.S.C. § 1055(c), a participant and his spouse must be provided with QJSA benefits and the only way for a participant to opt out of a QJSA is to submit a joint writing with his extant spouse expressly waiving the benefit. *Id*. And the waiver can occur only during the applicable election time period. *Id.*

Second, the Retirement Equity Act (REA), which modified ERISA, also emphasizes the participant's retirement date. *Id.* REA changed the requirement that surviving-spouse benefits could be paid only to a spouse who was married to the participant on his retirement date *and also* on the date of the participant's death, to require only that a spouse be married to the participant on the date of retirement. *Id.* Once a participant retires "the spouse at that time becomes the surviving spouse entitled to QJSA benefits." *Id.* at 1058.

Third, the objectives of Congress are met by the rule that "a QDRO may not reassign surviving-spouse benefits after a plan participant has retired." *Id.* Section 1055(c), which requires plans to provide QJSA benefits, was established in part to ensure that surviving spouses have a steady income stream. *Id.* And REA was meant to change ERISA "to take into account changes in work patterns, the status of marriage as an

economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home." *Id.* (quotation omitted). QJSA benefits are meant to protect nonparticipant spouses, especially those spouses who "may not work outside the home and thus may not have independent retirement benefits." *Id.*

And fourth, establishing when benefits vest is important to achieve "one of the principal goals underlying ERISA," which is to ensure that plans can be "'uniform in their interpretation and simple in their application.'" *Id.* at 1059 (quoting *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3rd Cir. 2005)). Predictability and finality are essential because QJSA benefits are calculated on the life expectancies of the two spouses at the point retirement benefits become available. *Id.* If participants could change surviving beneficiaries after the benefits payments had already begun, plan administrators could not rely on fixed actuarial assessments. *Id.*

Despite their minor factual differences, we adopt the reasoning of *Carmona* and *Hopkins*. Holding that QJSA benefits are fixed on a participant's retirement and vest in a surviving spouse most comports with ERISA's scheme, Congress's intent, and the importance of predictability, finality, simple application, and the uniform application of ERISA. The *Hopkins* court also persuasively highlighted that this approach wreaks no injustice between extant and former spouses because a former spouse can protect her predetermined interests simply by obtaining a QDRO before the participant retires. 105 F.3d at 157.

Not only do we find the reasoning of *Carmona* and *Hopkins* more persuasive than the Hawaii Supreme Court's holding in *Torres*, we also see *Torres* as distinguishable.

The plan participant in *Torres* died before completing the paperwork necessary to begin receiving his pension benefits, and so his surviving, extant spouse was permitted to elect a pension benefit to be paid to her as a 100% contingent annuitant. 60 P.3d 798 at 805. The participant's former wife had obtained a DRO based on her earlier decree that awarded her part of her ex-husband's retirement benefits. *Id.* at 805, 806. The DRO ordered that the former wife be treated as if she were her ex-husband's surviving spouse. *Id.* at 806. The extant spouse argued that her rights to receive survivor benefits had vested upon her husband's retirement or death. *Id.* at 814. The Hawaii Supreme Court held that surviving-spouse benefits do not vest in a surviving spouse on a participant's retirement date. *Id.* at 822. *See also Trs. of the Dirs. Guild of Am. Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 423–24 (9th Cir. 2000) (holding that death benefits did not automatically vest in a surviving *non-spouse* beneficiary on the participant's death). But *Torres* did not concern a QJSA that requires certainty and predictability and that calculates benefits based on the expected lives of *both* the participant and his surviving spouse.

Because we hold that QJSA benefits vest in a surviving beneficiary at the time of the participant's annuity start date, Shelly's interest as actual and designated surviving beneficiary vested at the time of Gary's retirement. And because her interest vested at the time of Gary's retirement, Patricia's DRO would require the Plan to pay a form and type of benefit no longer available as well as to pay increased benefits in violation of section 1056(d)(3). The benefits cannot be paid over Patricia's lifetime, and Patricia cannot be substituted as the surviving beneficiary because the benefits are irrevocable and have

already vested in Shelly. They also were calculated according to Gary's and Shelly's respective life expectancies. The benefits therefore would have to be changed to accommodate Patricia's objective. The Plan would also be required to pay additional benefits because Shelly's vested benefits already require the Plan to pay her 50% of Gary's lifetime benefits. Under Patricia's argument, the Plan would also have to pay her the additional benefits as set out in the DRO.

We recognize that the result of our holding is not consistent with the result contemplated in the Langston's 1993 dissolution judgment and decree. We also recognize that Gary failed to meet his obligation under that judgment when he designated Shelly, not Patricia, as his survivor beneficiary. But we are bound to strictly apply ERISA, and we are mindful that Patricia could have protected her interests by obtaining a DRO and submitting it to the Plan at some point during the many years after the dissolution judgment but before Gary retired.

The district court erred by concluding that the DRO was qualified.

II

McShane argues that the district court abused its discretion by awarding Patricia attorney fees. Under ERISA "[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (2006). We review a district court's award of attorney fees for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The United States Supreme Court recently held that although section 1132(g)(1) does not limit attorney fees to "a prevailing party," the party seeking attorney fees must show some degree of success on the merits. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156, 2158 (2010). The *Hardt* court concluded that "achieving trivial success on the merits or a purely procedural victor[y]" is not sufficient to satisfy the some-success-on-the-merits standard. *Id.* at 2158 (quotation omitted). But there is some success on the merits "if the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquiry into the question whether a particular party's success was substantial or occurred on a central issue." *Id.* (quotation omitted). It also held that using a five-factor test to guide a court's discretion under section 1132(g)(1) is not required, but once the some-success standard has been met, a court may consider five factors. *Id.*, n.8. *Cf. Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984) (laying out the five factors).

Because we conclude that Shelly's interest in the survivor benefits had vested when Gary retired and, therefore, Patricia's DRO is not qualified, Patricia is not entitled to attorney fees; she did not ultimately have some success on the merits of her claim. It is not necessary to analyze the *Westerhaus* factors to reach this conclusion. We also observe that the district court's assessment of fees was largely driven by its carefully-reasoned and thoroughly-analyzed, but we think mistaken, view on the merits of this complex and close case.

Reversed.