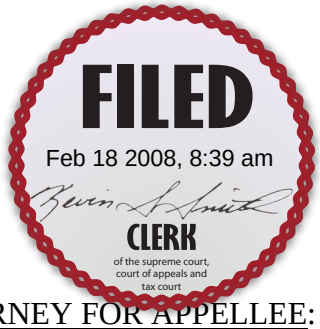

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IN THE
COURT OF APPEALS OF INDIANA

DELBERT R. PARHAM,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 34A02-0710-CV-872
	)	
SHARI L. PARHAM,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0303-DR-241

February 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Delbert R. Parham appeals the trial court's order denying his objection to the submission of a qualified domestic relations order (QDRO), which set over a portion of his early retirement benefits to his former spouse, appellee-respondent Shari L. Parham. Specifically, Delbert claims that the award was an abuse of discretion because he had no interest in those benefits and they had not vested prior to the dissolution of the parties' marriage. Finding no error, we affirm the judgment of the trial court.

FACTS

Delbert and Shari were married on July 25, 1980. On January 21, 2004, the Parhams' marriage was dissolved. The dissolution decree provided in part that Shari was to receive 40% of Delbert's monthly pension benefits from the Daimler/Chrysler Corporation (Chrysler) when Delbert reached the age of sixty-five. Thereafter, on June 29, 2004, Shari submitted a QDRO in an attempt to comply with the provisions of the decree. She submitted an additional QDRO on January 1, 2005. Both QDROs were Chrysler forms, which contained the following provisions:

> If the participant retires prior to his . . . normal retirement date and receives subsidized early retirement pension benefits from the Plan, then after the participant's retirement, the amount of the alternate payee's benefit payments
>
> Will be increased
>
> By a share of the early retirement subsidies, in the proportion specified above.
> . . .
>
> If the Plan pays a cost-of-living increase or any other postretirement benefit increase to the participant, the amount of the alternate payee's benefit payments
>
> Will be increased

> By a share of such postretirement benefit increase, in the proportion specified above. . . .

Appellee's App. p. 6.

In a letter dated March 2, 2005, Chrysler sent Shari a denial letter stating in part that a QDRO "cannot specify a date before which AP (alternate payee), [namely, Shari] cannot start receiving benefits." Id. at 38. As a result, on August 16, 2005, Shari filed a motion to submit a revised QDRO, requesting that the trial court permit her to delete the provisions as to when she could start receiving benefits. Although Delbert objected to Shari's filing of a revised QDRO, he did not challenge the increased benefits provisions cited above.

Following a hearing, the trial court issued the following order on March 14, 2006, awarding Shari 50% of a fractional share in Delbert's pension plan. Specifically, the trial court ordered as follows:

> 1. Petitioner's Chrysler Pension Plan, in an amount equal to one-half (1/2) times a fraction, the numerator of which is the number of months the parties were married, to wit; two hundred eighty three (283), and the denominator of which is the total number of months the Petitioner accrues pension benefits while working for Chrysler Corporation. The Respondent is entitled to a QDRO Order fixing said interest, upon presentation.
>
> 2. It is further Ordered that said pension benefits shall be paid to the Respondent, at such time as the petitioner starts receiving pension benefits.

Appellant's App. p. 39. Thereafter, Delbert appealed the trial court's order that permitted Shari to submit the revised QDRO. The only issues that Delbert raised in the appeal were whether the trial court improperly treated Shari's motion to present the revised QDRO as a motion for relief from judgment and whether it was an abuse of discretion to grant that

motion because Shari had failed to assert a meritorious claim as required by Trial Rule 60(b)(8). Parham v. Parham, 855 N.E.2d 722 (Ind. Ct. App. 2006), trans. denied. We rejected Delbert's arguments and affirmed the judgment of the trial court. Id. at 731. Moreover, we determined that Shari presented a meritorious claim because the dissolution decree regarding the distribution of Delbert's pension "was impossible to accomplish" because the distribution plan did not comport with the requirements of the Employment Retirement Income Security Act.[1] Id. at 730.

Thereafter, on April 3, 2007, Shari submitted another QDRO, which again included the language quoted above regarding the increase of benefits. The trial court's entry stated that "Respondent . . . files submission of QDRO together with Sample Pension Plan QDRO: Separate Interest. Same is examined and approved." Appellant's App. p. 12. On April 23, 2007, Delbert, for the first time, specifically objected to the portion of the QDRO that allowed for Shari's pension benefit to be increased if Delbert were to begin receiving early retirement benefits or an increase in cost of living benefits.

At a hearing on June 11, 2007, Delbert withdrew his objection to the cost of living increase and proceeded solely on his objection to the inclusion of the early retirement benefits. It was established that the early retirement benefit did not vest and that Delbert had no interest in that benefit until he had thirty-five years of service at Chrysler. The evidence also showed that Delbert had achieved thirty years of service at Chrysler as of November 15, 2006, and he would receive an early retirement benefit or supplement after thirty years of service.

[1] 29 U.S.C. §§ 1001-1461.

Delbert testified that the early retirement benefits or supplements were "not vested" prior to thirty years of service. However, he offered no testimony as to what he believed or understood "vesting" to mean. Appellant's App. p. 29-30. Delbert did not testify as to whether he or Shari had begun to draw any benefits.

During the hearing, the following exchange occurred:

> [Delbert's Counsel]: So, you do not believe that this should be included into the QDRO or a benefit that should be given to your wife because you had no interest in it during the marriage or at the time of dissolution?
>
> [Delbert]: That's correct.
>
> [Delbert's Counsel]: Are you requesting that the court issue an order modifying the QDRO to check the will-not-be-increased box on paragraph of the benefits payable to [Shari]?
>
> [Delbert]: I believe that's correct, yes.

Id. at 30. At the conclusion of the hearing, the trial court overruled Delbert's objection and entered the QDRO that Shari had tendered on April 3, 2007. Delbert now appeals.

DISCUSSION AND DECISION

In addressing Delbert's contention that the trial court erred in entering the QDRO because he purportedly had no interest in the early retirement benefits prior to November 15, 2006, we initially observe that the marital pot closes on the day that the petition for dissolution is filed. Granzow v. Granzow, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006). Additionally, pension benefits may only be included in the marital pot if they have vested or are not forfeited upon termination of employment. Id.

Notwithstanding the above, Shari claims that Delbert's claim cannot succeed because his arguments challenging the QDRO are barred by res judicata. Specifically, Shari contends that Delbert's argument must fail because he did not object to the provision regarding the increase in benefits in the QDROs that had been originally submitted on June 29, 2004, and January 1, 2005.

The principle of res judicata operates to prevent the repetitious litigation of disputes that are essentially the same. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005). More particularly:

> Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action.

Id. (Emphasis added). Before claim preclusion applies, the following four requirements must be met:

> (1) The former judgment must have been rendered by a court of competent jurisdiction;
> (2) The former judgment must have been rendered on the merits;
> (3) The matter now in issue was, or could have been determined in the prior action; and
> (4) The controversy adjudicated in the former action must have been between parties to the present suit or their privies.

Id. (Emphasis added).

In this case, Delbert maintains that his claim is not barred under res judicata principles because "we have a new issue" in this appeal. Reply Br. p. 2. More specifically, Delbert asserts that the question is now whether the trial court can award property that had not yet

vested. However, Delbert's first objection to the increased benefits provision was not made until nearly twenty-three months after the dissolution decree was entered. More specifically, the dissolution decree of January 21, 2004 did not prohibit the "will be increased" checked off provision in the QDRO, and Delbert never challenged the inclusion of that provision until April 23, 2007. Moreover, when Delbert initiated his first appeal on the third proposed QDRO, Delbert did not raise any issue about the provision cited above. Rather, Delbert waited until he commenced this appeal.

In sum, the record shows that (1) the orders were all issued by a divorce court with competent jurisdiction over the parties; (2) the orders were not simply default judgments; (3) the "will be increased" provisions in the QDROs could have been challenged by a timely objection or appeal; and (4) the orders involved the present parties. As a result, we must conclude that Delbert's claim is barred by the principles of res judicata.

As an aside, we also observe that the law of the case doctrine precludes the litigation of appeals in a piecemeal fashion:

> Under the law of the case doctrine, an appellate court's determination of the legal issue is binding both on the trial court on remand and on the appellate court on a subsequent appeal, given the same case with substantially the same facts. All issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case. This doctrine merely expresses the practice of the courts generally to refuse to reopen what has been decided and is based upon the sound policy that when an issue is litigated and decided, that should be the end of the matter.

Boonville Convalescent Center, Inc. v. CHS, 834 N.E.2d 1116, 1131 (Ind. Ct. App. 2005). Although Delbert asserts that "the legal issue is entirely different than that presented in the initial appeal," reply br. p. 3, the record shows that Delbert previously objected to the

deletion of one sentence in the ten pages that were included in the QDRO. In this appeal, Delbert objects to the retention of a single sentence that had been included in the original QDRO. Although application of the law of the case doctrine is discretionary, In re Adoption of Baby W., 796 N.E.2d 364, 372 (Ind. Ct. App. 2003), it is apparent that Delbert is merely seeking to challenge a provision at this juncture that was impliedly decided in the prior appeal. Thus, Delbert is not permitted to raise additional challenges to the QDRO.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.