

STATE OF MICHIGAN  
COURT OF APPEALS

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JUDITH WEAKS,

Plaintiff-Appellant,

v

CITY OF LINCOLN PARK,

Defendant-Appellee.

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UNPUBLISHED  
February 10, 2009

No. 280181  
Wayne Circuit Court  
LC No. 06-608463-CK

Before: Servitto, P.J., and Owens and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying her motion for summary disposition and granting summary disposition to defendant. We affirm.

Plaintiff initiated this declaratory action when defendant refused to pay her health care benefits. Plaintiff divorced her husband, defendant's now-retired employee, in 1999. As her ex-husband neared retirement, she and he caused an Eligible Domestic Relations order (EDRO), entitling her to a portion of his retirement benefits to enter with the trial court. According to plaintiff, she was entitled to health care benefits through application of the EDRO to the provisions of the retirement plan issued by defendant. As previously indicated, after a hearing on the parties' cross-motions for summary disposition, the trial court disagreed, denying plaintiff's motion and granting defendant's, dismissing the case. This appeal followed.

On appeal, plaintiff asserts that the trial court erred in concluding that she was not entitled to healthcare benefits under defendant's plan. We disagree.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Furthermore, this case presents an issue of statutory interpretation, which is also subject to a de novo review. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

According to plaintiff, the ordinance governing the subject retirement plan specifically provides for the payment of health insurance benefits to beneficiaries of the plan and because she

is such a beneficiary, as defined in the plan, she is entitled to health care benefits. Plaintiff contends that analysis of the ordinance language is dispositive of the issue before the Court. Plaintiff further contends that the EDRO is only minimally relevant, as health care benefits provided by the plan are not benefits that her ex-husband owned or could assign. The starting point of analysis, however, is necessarily the EDRO as it is the vehicle that directs the distribution of any plan benefit and provides the plan administrator with the authority to distribute any such benefit.

Because plaintiff's ex-husband was a public employee, these parties must file an EDRO with the governing retirement system to allow plaintiff to receive an interest in her ex-husband's pension benefits, in accordance with the EDRO Act, MCL 38.1701 *et seq.* See, *Mixon v Mixon*, 237 Mich App 159, 165; 602 NW2d 406 (1999). The EDRO Act, at MCL 38.1702, defines several relevant terms, as follows:

(b) "Benefit" means an annuity, a pension, a retirement allowance, or an optional benefit accrued or accruing to a participant under a retirement system or a postretirement subsidy payable to a participant under a retirement system.

(c) "Domestic relations order" means a judgment, decree, or order of a court made pursuant to the domestic relations law of this state and relating to the provision of alimony payments, child support, or marital property rights to a spouse of a participant under a judgment of separate maintenance, or to a former spouse, child, or dependent of a participant.

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(e) "Eligible domestic relations order" or "EDRO" means a domestic relations order that is considered an eligible domestic relations order under section 11 or that meets all of the following requirements:

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(iii) The domestic relations order states the amount or percentage of the benefit to be paid to an alternate payee, or the manner under which the retirement system is to determine the amount or percentage of the benefit to be paid to an alternate payee.

(iv) The domestic relations order states that it applies to the retirement system and that the retirement system shall make payments to the alternate payee as required under the eligible domestic relations order and this act.

(v) The domestic relations order does not require the retirement system to provide a type or form of benefit not provided by the retirement system or a form of payment not provided by this act.

Clearly, the purpose of an EDRO is to direct a plan administrator which of a participant's benefits, in what amount, are to be paid to an alternate payee. To that end, an alternate payee is

only entitled to benefits under the plan to the extent that the trial court, through its order (EDRO), directs such benefits to be paid.

Other provisions in the EDRO Act support such an interpretation. Specifically, MCL 38.1703 provides:

Subject to the requirements of this act, an alternate payee is entitled to an actual interest in a share of a benefit that is or will become payable to a participant, *if so provided in an EDRO filed with the retirement system*. The retirement system shall administer the payment of a benefit pursuant to the EDRO and this section (emphasis added).

The language “if so provided in an EDRO” immediately following the phrase “an actual interest in a share of a benefit” presents a limitation on payment to an alternate payee, i.e. the payee will receive interest in a share of a benefit if the benefit is provided in an EDRO.

That the plan administrator “shall” administer the payment of a benefit “pursuant to” the EDRO further suggests that the administrator is limited in its administration of benefits to those specified in the EDRO. The word “shall ” denotes mandatory action. *Costa v Community Emergency Medical Services, Inc.*, 475 Mich 403, 409; 716 NW2d 236 (2006). “Pursuant to” is defined in Black’s Law Dictionary (7<sup>th</sup> Ed.) as “in compliance with” and “as authorized by.” The administrator, then, is obligated to administer the payment of a benefit in compliance with or authorized by the EDRO. To allow an administrator to administer a benefit not specified in the EDRO would defeat the entire purpose of the EDRO --to order the fair distribution of what has been determined to be marital property--and that portion of the EDRO Act *requiring* that the order state the amount or percentage of the benefit to be paid to an alternate payee, or the manner under which the retirement system is to determine the amount or percentage of the benefit to be paid to an alternate payee. See MCL 38.1702(e)(iii). The benefit to be administered, then, must be specified in the EDRO.

Applying MCL 38.1703 to the instant facts, plaintiff is entitled to an actual interest in a share of a benefit that is or will be payable to her ex-husband, if that interest is provided in an EDRO filed with the retirement system. The EDRO at issue provides, in relevant part:

5. The Participant assigns to the Alternate Payee a portion of his benefits from the Plan and the Plan will pay benefits to the Alternate Payee according to the following terms and conditions:

(a) It is the parties’ intention, and the order of this Court, that the Alternate Payee receive a monthly benefit from the Plan of \$1,000.00 of the Participant’s straight life retirement pension, including a pro rata share of any guaranteed automatic annual post-retirement benefit increases.

(b) It is the parties’ intention and the order of this Court that the alternate payee may elect the Plan’s “annuity withdrawal option” and receive a distribution from the Participant’s accumulated contributions account in the amount of \$60,000 as of the Participant’s date of retirement. In the event the Alternate Payee elects this

lump sum option, the benefits payable to the Alternate payee under Paragraph 5(a) shall be calculated to be actuarially equivalent.

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7. The Participant, the Alternate payee and the Court intend this order to be an EDRO under the Eligible Domestic Relations Order Act (Public Act 46 of 1991), the Plan and related legislation.

8. The parties agree that their mutual intent is to provide the Alternate payee with a retirement payment that fairly represents what they have agreed to be the Alternate Payee's marital share of the Participant's accrued retirement benefit as defined in paragraph 5(a). . .

Notably absent from the EDRO is any mention of health care benefits. The only benefit intended to be distributed to plaintiff, is, as specified in the EDRO, a \$1,000 per month portion of her ex-husband's pension.

Moreover, benefits are defined at MCL 38.1702(b) "an annuity, a pension, a retirement allowance, or an optional benefit accrued or accruing to a participant. . ." If, as plaintiff contends, the health care benefits are not owned or payable to her ex-husband and thus not subject to assignment through the EDRO, the same are not "benefits", as defined in MCL 38.1702(b) that can be distributed by a plan administrator to an alternate payee.

Because the parties did not address health benefits in the EDRO, the plan administrator is not authorized to distribute that benefit to plaintiff and granting plaintiff her request for those benefits would violate the Eligible Domestic Relations Order Act. The court having spoken through its written order and its order specifying the precise benefits to be assigned to plaintiff through the plan, the order is to be enforced as written and not expanded upon by either party.

Plaintiff additionally contends that defendant waived its argument that she was not entitled to health care benefits pursuant to the EDRO by failing to plead the same as an affirmative defense. Defendant argued this defense in response to plaintiff's motion for summary disposition and in its own cross-motion for summary disposition and plaintiff did not object to the argument either at summary disposition or in a motion for reconsideration. Plaintiff instead raises this issue, for the first time, on appeal. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Because plaintiff failed to preserve this issue, we decline to review it.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly