STATE OF MICHIGAN

COURT OF APPEALS

MARY PHYLLIS WILLIAMS,

Plaintiff-Appellant,

v

LAWANA WILLIAMS, as Personal Representative for the Estate of HUSIE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
March 28, 2013

No. 307607
Wayne Circuit Court
Family Division
LC No. 96-622439-DM

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff, Mary Phyllis Williams, appeals as of right[1] from the trial court's order amending a Qualified Domestic Relations Order (QDRO) 13 years after it initially was entered. We reverse the trial court's decision to grant defendant's motion to amend the QDRO to conform with the judgment of divorce, we vacate the amended QDRO, and we reinstate the original QDRO.

I. BACKGROUND

Plaintiff and Husie Williams were married on July 8, 1978, and produced four children during their marriage. Plaintiff filed for divorce on April 9, 1996. Husie was served on May 31, 1996. He never filed an answer to the complaint, and after over 18 years of marriage, the trial court entered a default judgment of divorce. Relative to the issue on appeal, the judgment of divorce provided the following under the title "PROPERTY SETTLEMENT":

[1] Defendant argues that we lack jurisdiction over this appeal because plaintiff could not appeal of right the order appealed. To the extent the order modifying the QDRO was not appealable by right, we treat the claim of appeal as a delayed application for leave to appeal, which we grant. *In re Investigative Subpoena*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

> Pension and Retirement Benefits
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> The value of both the Ford Motor Company Pension and T.E.S.P.H.E. [Tax Efficient Savings Plans for Hourly Employees] account shall be determined as of October 31, 1996 and the pay out to Plaintiff will be within thirty (30) days of the determination of those figures.
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> The retirement benefit plan or plans subject to this Order are as follows:
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> 1. Pension which shall be valued on or about October 31, 1996;
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> 2. T.E.S.P.H.E. which shall be valued on or about October 31, 1996.
>
> The alternate payee is the Plaintiff, MARY PHYLLIS WILLIAMS . . . .
>
> The participant and the alternate payee were married on July 8, 1978, and a Judgment of Divorce entered on October 15, 1996.
>
> The participant assigns to the alternate payee a portion of his interest in the following: a) Pension; and b) T.E.S.P.H.E. The portion equals 50% of the participant's accounts in the plans, which has accrued from July 8, 1978 to October 31, 1996, pursuant to entry of a Judgment of Divorce dated October 15, 1996.
>
> The Ford Motor Company pension and T.E.S.P.H.E. shall be equally divided between the parties through a rollover and/or Qualified Domestic Relations Order (QDRO), in order to avoid any tax consequences to either party.
>
> There shall be a Qualified Domestic Relations Order (QDRO) on the Ford Motor Company pension and T.E.S.P.H.E. valued through October 31, 1996, pursuant to the Judgment of Divorce including survivorship benefits so that the Plaintiff shall receive one-half of the pension benefits payable to the Defendant through the Ford Motor Company pension and T.E.S.P.H.E. and in accordance with the terms of the Qualified Domestic Relations Order which shall be a separate Order and attached hereto.
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> The plaintiff shall receive a Qualified Domestic Relations Order for a portion of the T.E.S.P.H.E. in the amount of 50% of the participant's account in each plan, which has accrued from July 8, 1978 to October 31, 1996 pursuant to the Judgment of Divorce entered in this matter.

On the same day that the judgment of divorce was entered, the trial court entered two qualified domestic relations orders, one pertaining to the Ford-UAW retirement plan and the other pertaining to the TESPHE. The one related to the Ford-UAW retirement plan, which is the one relevant to the issue on appeal, established that plaintiff was designated as the "Alternate Payee" and further provided in pertinent part:

IT IS HEREBY ORDERED that pension benefits otherwise payable to the Participant shall be paid as follows:

1. The Ford Motor Company-UAW Retirement Plan ("the Plan") shall pay in accordance with the following to the Alternate Payee shown below a portion of the retirement benefits payable to the Participant shown below:

a. The amount payable to the Alternate Payee shall equal 50% of the income benefit computed as of October 31, 1996.

b. The amount payable to the Alternate Payee shall include plan improvements.

c. Such payment shall commence when payments to the Participant commence upon retirement pursuant to the Plan if both the Alternate Payee and Participant survive to such date and shall cease upon the death of the Participant.

d. The Alternate payee shall have the right to elect to receive actuarially reduced benefit payments under the Plan any time after the participant reaches early retirement age under the Plan but beginning before participant retires.

e. The Alternate Payee shall be treated as a surviving spouse under the Plan and, accordingly, in the event of death of the Participant either before or after commencement of retirement benefits, payment shall be made to the Alternate Payee as provided in the Plan for a surviving spouse.

Shortly thereafter, Ford sent a letter dated October 30, 1996, to both plaintiff and Husie stating that

> [t]he alternate payee is to be treated as a surviving spouse under the Plan. Survivor benefits to a subsequent spouse will not be permitted unless a modified order is received which designates a specific portion of the survivor benefit to be paid to the alternate payee as a survivor spouse.

On April 30, 1999, Husie married Lawana Williams. And after over 39 years of employment with Ford, Husie retired on July 1, 2006. Once Husie retired, plaintiff started receiving $374.21 per month as disbursements from the Ford-UAW retirement plan. But after Husie died in December 2008, payments to plaintiff as the surviving spouse commenced in the amount of $1,219.97 per month.

Over a year after Husie's death, on December 21, 2009, Lawana, as personal representative of Husie's estate,[2] filed a motion to amend the QDRO. Lawana argued that the award of full survivorship benefits to plaintiff under the QDRO was not consistent with the judgment of divorce which "specifically awarded the Plaintiff . . . 50% of the survivorship benefits." The trial court denied the motion, stating that, in its view, the judgment of divorce did not clearly award plaintiff only a portion of the surviving spouse benefit and that, further, "too much time has elapsed from entry of the Judgment of Divorce to the time the Motion was filed" to warrant granting any relief.

On February 24, 2010, defendant filed a motion for re-hearing. In the motion, defendant stated that the trial court's decision was "in disagreement with the decision upon virtually identical facts rendered" by another Wayne Circuit Court Judge. At the May 26, 2010, hearing on the motion for re-hearing, the trial court noted that the decision of another Wayne Circuit Court Judge had no precedential effect. Defendant argued that the QDRO was "invalid," which was a reason to modify it, even after 13 years had passed from its issuance. Further, defendant maintained that there was no way to know that plaintiff was going to receive the entirety of the pension funds until Husie actually passed away and plaintiff survived him. Thus, defendant asserted that holding the 13-year timeframe against her was not appropriate. Toward the end of the hearing, the trial court stated that it would take the matter under advisement and look at the judgment of divorce once again. But before adjourning, the trial court opined that even if it granted defendant's motion to amend the QDRO, that plaintiff would still receive an increase from the $374 she was receiving before Husie died. The trial court also decided to obtain an expert opinion on the question from private attorney Robert Treat.

On June 9, 2010, the trial court held another hearing, at which Treat provided testimony. Treat stated that according to the terms of the QDRO, plaintiff was to receive 100% of the surviving spouse benefit. Treat opined that this was a problem because "the case law clearly . . . indicates that the Judgment should control, not the QDRO." Treat also broke down the details of the marriages, stating that 47.03% of the pension accrued during Husie's marriage to plaintiff, 18.63% accrued during Husie's marriage to Lawana, and approximately 34% accrued while married to no one. When asked to explain how such a situation should be resolved normally, Treat responded,

> Well, in a normal case, if everyone knew what they were doing and it was negotiated and you've had a hearing and you all knew what to do, if I were on the bench, I would say okay, you get the survivor benefit attributable to the marriage. And each of the various spouses would get the survivor benefit for the period of the marriage.

The trial court noted that this did not explain what to do with the 34% of the pension that was accrued while married to no one. Treat explained that "if you gave each party their share, 47

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[2] Hereinafter, "defendant" will refer to Lawana when she is acting as personal representative of Husie's estate.

percent of the survivor annuity to [plaintiff], 18.63 percent to [Lawana], you can also give them part of what's left over, if you think that's right."

Treat further opined that the QDRO did not comport with the judgment of divorce and that "the amount of the survivor annuity should be the same as the benefit that [plaintiff] got while she was living." When asked to clarify, Treat agreed with defense counsel's suggestion that "Husie's passing should not affect the amount [plaintiff] would receive after his death," and as a result, plaintiff should continue to receive the $374 per month she received before Husie's death. But later, when the trial court asked Treat if it could then divide the 34% evenly between the two spouses, Treat said that the court could do so, resulting in plaintiff getting approximately 64% (her 47% plus 17% or half of the amount accrued while Husie was unmarried) of the survivorship benefits and Lawana getting approximately 36% (her 19% plus 17% or half of the amount accrued while Husie was unmarried). The trial court adjourned the proceedings without making any determination.

On July 7, 2010, defendant filed some supplemental authorities in support of its motion and also filed a pleading asserting that "Treat[] testified that the judgment [of divorce] is in the proper form, but the QDRO is not. He said that if the QDRO were properly drafted Plaintiff would continue to receive benefits in the same amount after Husie Williams died as she had during his lifetime." Defendant then listed several authorities in support of its position, including the decision it cited previously of another Wayne Circuit Court Judge in the case *Neville v Neville* (Case No. 94-402973-DM) and three unpublished cases from this Court.[3] Defendant maintained that these cases "make it clear that the JOD controls, and that if the QDRO is inconsistent with the JOD the QDRO is invalid and must be amended."

The trial court's next hearing on the matter was held on September 23, 2010. The trial court noted that, even though it recognized that the unpublished decisions of this Court were not binding, it nevertheless thought that

> those cases give some indication about how the Court of Appeals views this type of situation. And I think it does change somewhat the way that the Court, that I view the situation, as well. I need to follow the case law and if the Court of Appeals, even though they're not published decisions, if the Court of Appeals is indicating that a certain interpretation of the law is required, that's what I'm going to do, too.

Plaintiff voiced her concerns that defendant should not be able to alter the terms of the QDRO because the QDRO was a matter strictly between plaintiff and Husie, and he never indicated that it was something he wanted to have revisited. The trial court noted that regardless of Husie's lack of objection to the QDRO, in this instance "Mr. Treat feels that the way that the DQRO was done is not consistent with the Judgment of Divorce. That's the problem." The trial court adjourned to allow plaintiff, who was representing herself, to take the unpublished Court of

[3] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

Appeals cases and present them to an attorney, whom she had been consulting with during this process.

At the next hearing on October 7, 2010, defendant reiterated that, according to "Mr. Treat," if the QDRO was properly drafted, then plaintiff would receive the same amount after Husie's death that she was receiving before, which was $374. The trial court finally issued its ruling:

> Well, after reviewing the cases presented and especially, I think the supplemental brief, the Court's main concern initially was that too much time had passed from the entry of this QDRO to now set it aside, because it is also an Order of the Court.
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> But these cases that were presented, although they're unpublished, the Court of Appeals seems to be saying that it's a question of a correction to the QDRO where there has been misinterpretation or a poorly drafted QDRO.
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> So it appears, from these cases, they don't think that [MCR] 2.612 really applies to these situations. So I'm going to adopt the law that appears to be working in this case and agree with the Defendant that the QDRO will be redrafted pursuant to [defendant's] argument.

The trial court then entered an order stating that defendant was to submit a QDRO that was consistent with the judgment of divorce and that any payments plaintiff receives in the meantime in excess of what she normally received before Husie's death (i.e., $374) are to be forwarded to defendant's counsel.

After this order was entered, Treat drafted an amended QDRO. The QDRO was submitted to Ford for its approval,[4] but Ford on March 11, 2011, initially denied it because it would not accept a domestic relations order that modifies the portion of a survivor benefit assigned to a former spouse if the order was not entered before the participant's death. However, on June 17, 2011, Ford reversed its determination and said that it would honor the proposed QDRO because it indeed met the "form and content of the Plan's administrative policies and procedures." All that Ford needed was the proposed order to be approved by the court.

On September 27, 2011, defendant moved at the trial court to have an amended QDRO entered. However, the QDRO submitted to the trial court was not the same one that Ford approved a few months earlier. Defendant explained at the hearing that she was not happy with the QDRO that Treat drafted and instead was proposing a different QDRO that had different terms. While Treat's QDRO (the one ultimately approved by Ford) provided that plaintiff would receive half of the survivor benefit, defendant's submitted QDRO had plaintiff receiving 23% of the survivor benefit (which equated to $374). The trial court wanted Treat to explain why he drafted his QDRO in the manner that he did and adjourned the hearing.

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[4] Under 29 USC 1056, the plan administrator must also approve a QDRO.

On November 18, 2011, the trial court held its last hearing. Treat explained that he was now interpreting the judgment of divorce to provide plaintiff with one-half of the survivor's benefit. While he acknowledged that he stated previously that one could interpret the judgment of divorce in providing plaintiff with the same benefits after Husie's death that she received before his death, he thought that his 50/50 interpretation was the "most defensible" and accordingly put that into his QDRO. The trial court agreed, stating:

> I'm going to do what Mr. Treat says is the most consistent way to interpret this Judgment of Divorce. And there are a couple of reasons why I think that the first QDRO presented by Mr. Treat is the most defensible.
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> They did qualify with dates in different parts of this Judgment. That was not done on the bottom of page seven in that last paragraph. The one-half paragraph. So that paragraph, I mean, although they limited it with dates throughout the Judgment, they didn't there. And then there was the information provided that Mr. Williams could have changed his – the choices subsequent to that notice from Ford, and he didn't do that. It was never brought to the Court's attention again.
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> So for that reason, I'm going to enter the QDRO that was first prepared by Mr. Treat.

Thus, the court entered the amended QDRO. While the order was signed on November 18, 2011, it was entered *nunc pro tunc* and was to be treated as being entered on the date of divorce, October 15, 1996. The salient portion of the amended QDRO provided that

> [t]he Alternate Payee shall be designated as a surviving spouse of the Participant for purposes of Fifty Percent (50%) of the monthly postretirement survivor annuity . . . .
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> In addition, the spouse to whom the Participant was married at the time of his death, shall receive the portion of the monthly postretirement survivor annuity not assigned to the Alternate Payee under this Order.

II. ANALYSIS

Plaintiff argues on appeal that the trial court erred when it modified the QDRO. We agree. We review a trial court's decision to enter a *nunc pro tunc* judgment for an abuse of discretion. *Vioglavich v Vioglavich*, 113 Mich App 376, 386; 317 NW2d 633 (1982). But a trial court's interpretation of a QDRO is reviewed de novo. See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). Additionally, the interpretation of the terms of a divorce judgment, similar to the interpretation of contract terms, is a question of law that we review de novo. *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008); *Healing Place at N Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

The trial court erred when it ordered the amendment of the QDRO. When a QDRO is executed contemporaneously with a divorce judgment and required by the terms of the judgment,

both the judgment and the QDRO are considered part of the property settlement. *Thornton v Thornton*, 277 Mich App 453, 457-458; 746 NW2d 627 (2007). Here, not only was the initial QDRO contemporaneously entered along with the divorce judgment, the judgment explicitly incorporated the terms of the QDRO, where the judgment provided that plaintiff was to receive benefits "in accordance with the terms of the Qualified Domestic Relations Order which shall be a separate Order and attached hereto."

Further, the trial court's view that MCR 2.612, governing relief from final judgments or orders, did not apply to defendant's motion to amend the QDRO was erroneous. Because the QDRO is properly treated as part of the final divorce judgment, MCR 2.612 in fact did apply to defendant's request for substantive changes to the QDRO. Of note, the Wayne Circuit Court case that defendant relied upon in the trial court was later reversed by this Court in *Neville v Neville*, 295 Mich App 460; 812 NW2d 816 (2012). In reversing, this Court clarified that "[t]his is not to say that the trial court could not interpret and clarify the parties' agreement without considering MCR 2.612. It may do so *provided it does not change the parties' substantive rights as reflected in the parties' agreement*." *Id.* at 469 (emphasis added). Here, plaintiff's substantive rights were being changed. The original QDRO unequivocally gave her sole survivorship benefits to the Ford-UAW benefits, while the amended QDRO only provided her with 50% of the survivorship benefits. Thus, the modification was subject to MCR 2.612.

MCR 2.612(C) provides the grounds for obtaining such relief:

> (1) On motion and on just terms, the court may relieve a party . . . from a final judgment, order, or proceeding on the following grounds:
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> > (a) Mistake, inadvertence, surprise, or excusable neglect.
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> > (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
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> > (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
> >
> > (d) The judgment is void.
> >
> > (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
> >
> > (f) Any other reason justifying relief from the operation of the judgment.
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> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. . . .

In *Neville*, the defendant similarly moved to amend the QDRO after more than a dozen years had passed from entry of the initial QDRO. The *Neville* Court concluded that "[b]ecause

defendant has neither argued nor otherwise established on appeal that his motion – brought more than 14 years after entry of both the . . . divorce judgment and the . . . QDRO – could be considered timely under MCR 2.612(C)(2). *Neville*, 295 Mich App at 470. In the present case, we come to the same conclusion. The argument at the trial court was that the QDRO was drafted incorrectly because it allegedly did not conform to the judgment of divorce. In other words, a "mistake" occurred in the drafting of the QDRO. Mistakes fall under the ground provided under MCR 2.612(C)(1)(a), and according to MCR 2.612(C)(2), defendant had one year from the entry of the QDRO to seek relief from it. Therefore, defendant's motion over 13 years after the entry of the QDRO was not timely.[5]

Because the amendment of the QDRO affected plaintiff's substantial rights and defendant's motion was untimely under MCR 2.612(C), we reverse the trial court's decision granting defendant's motion to amend the QDRO, we vacate the trial court's amended QDRO, and we reinstate the original 1996 QDRO. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

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[5] We also reject defendant's contention at the trial court that the relevant timeframe to consider should start when the "mistake" was first noticed by a party. The court rule does not use this methodology; instead, it plainly states that a person seeking relief from an order or judgment has "one year after the judgment, order, or proceedings was entered or taken." MCR 2.612(C)(2).