

[Cite as *Himes v. Himes*, 2004-Ohio-4666.]

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

SYLVIA JANE HIMES

Plaintiff-Appellant

-vs-

KENNETH HIMES

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. Sheila G. Farmer, J.

Case No. 2004AP020009

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County Court  
of Common Pleas, Case No. 91TC060312

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 31, 2004

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

FREDERICK H. BOHSE  
121 West 3rd Street  
Dover, Ohio 44622

TYRONE D. HAURITZ  
401 Bank One Tower  
Canton, Ohio 44702

*Hoffman, J.*

{¶1} Plaintiff-appellant Sylvia Jane Himes appeals the February 2, 2004 Judgment Entry of the Tuscarawas County Court of Common Pleas finding appellant is not entitled to any portion of defendant-appellee Kenneth Himes' 401(K) pursuant to the parties' Separation Agreement.

#### STATEMENT OF THE FACTS AND THE CASE

{¶2} The parties were married on June 14, 1978. On July 8, 1992, appellant filed for divorce in the Tuscarawas County Court of Common Pleas. The parties entered into a Separation Agreement on July 13, 1992. On August 18, 1992, the trial court entered a Judgment Entry-Decree of Divorce, incorporating the parties Separation Agreement.

{¶3} The parties' Separation Agreement incorporated two separate retirement plans which appellee participated in while employed at the Timken Company. The Separation Agreement allocated twenty-five percent of the Timken Company's Hourly Employees' Pension Plan to appellant and seventy-five percent to appellee. Second, the Separation Agreement provided appellant had no right to any portion of the the Investment Pension Plan or 401K plan, rather appellee was to retain the 401K plan "as his sole and individual property free and clear of any and all claims."

{¶4} The Separation Agreement at Article 6. Pension Rights provides:

{¶5} "The parties acknowledge that the Husband is a participant in the The Timken Company hourly employees' pension plan. The parties agree that the Husband's pension rights acquired through said pension plan shall be divided 75% to the Husband and 25% to the Wife. The Wife shall have the right to file a Qualified Domestic Relations Order transferring into the name of the Wife, the right to receive 25% of the Husband's pension

benefits, and the parties confer upon the court continuing jurisdiction to enforce by court order the agreement of the parties as to the division of Husband's pension rights as set forth hereinabove."

{¶6} A Qualified Domestic Relations Order ("QDRO") was filed on September 21, 1993. However, contrary to the terms of the Separation Agreement, the QDRO assigned to appellant twenty-five percent of the benefits due and payable upon appellee's retirement and/or eligibility, whichever occurs first, from appellee's pension plan *and from* his 401K.

{¶7} On October 1, 2002, the trial court adopted an amended QDRO filed by appellee, which did not provide appellant with a portion of the 401K. Appellant was not notified of the amended QDRO before it was filed and adopted by the trial court. On appeal, this Court held the trial court violated appellant's due process rights under the Ohio and United States Constitutions, and reversed the trial court's adoption of the amended QDRO and remanded.

{¶8} On September 25, 2003, appellee filed a motion to adopt the amended QDRO. The trial court held an evidentiary hearing on November 17, 2003. At the evidentiary hearing, appellant's attorney at the time of her divorce, John B. Wirtz, testified his understanding was appellant was to receive 25% of all of appellee's pension rights, including 25% of his 401(K). He further testified he did not prepare the QDRO filed on September 21, 1992, but believed it was prepared by appellee's counsel at the time of the divorce.

{¶9} On February 2, 2004, via Judgment Entry, the trial court held the original QDRO did not accurately reflect the terms of the Separation Agreement because appellant was not entitled to any portion of appellee's 401K. The trial court also held the original

QDRO was void ab initio, and accordingly adopted the amended QDRO, which accurately reflected the terms of the Separation Agreement.

{¶10} It is from the February 2, 2004 Judgment Entry appellant now appeals raising the following as assignments of error:

{¶11} “I. THE TRIAL COURT ERRED IN APPROVING AN AMENDED QUALIFIED DOMESTIC RELATIONS ORDER AS TO THE AMOUNT TO BE RECEIVED BY THE OBLIGEE WHERE COURT DID NOT RETAIN JURISDICTION TO MODIFY SPOUSAL SUPPORT OR DIVISION OF PROPERTY.

{¶12} “II. THE TRIAL COURT ERRED IN GRANTING APPELLEE’S MOTION TO MODIFY A PREVIOUS QUALIFIED DOMESTIC RELATIONS ORDER WHERE APPELLEE DID NOT MEET THE REQUIREMENTS OF AND DID NOT COMPLY WITH RULE 60(B), RULES OF CIVIL PROCEDURE.

{¶13} “III. THE COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING DEFENDANT TO FILE AN AMENDED QDRO TO CORRECT ALLEGED ERRORS IN THE ORIGINAL QDRO APPROVED AND PREPARED BY COUNSEL FOR DEFENDANT, WHICH WAS NOT A CORRECTION OF CLERICAL ERRORS, HENCE NOT A VALID NUNC PRO TUNC.”

I

{¶14} In the first assignment of error, appellant maintains the trial court erred in approving the amended QDRO, because the trial court did not retain jurisdiction to modify spousal support or the division of property in its Judgment Entry incorporating the parties’ Separation Agreement. Appellant argues her property interest was affected by the trial

court's February 2, 2004 Judgment Entry adopting the amended QDRO, in contrast to the portion of the original QDRO granting to appellant 25% of the 401(K) plan. We disagree.

{¶15} As set forth above, the parties entered into a Separation Agreement on July 13, 1992. On August 18, 1992, the trial court entered a Judgment Entry-Decree of Divorce, incorporating the parties Separation Agreement. Thus, the trial court determined spousal support and the division of property as of August 18, 1992 in the Judgment Entry-Decree of Divorce, incorporating the parties' Separation Agreement. The Separation Agreement clearly provides appellant is entitled to 25% of appellee's pension plan, but the 401(K) is to remain appellees own sole and individual property. The trial court's February 2, 2004 Judgment Entry adopting the amended QDRO does not conflict or modify the court's previous division of property set forth in the parties' separation agreement.

{¶16} The first assignment of error is overruled.

## II, III

{¶17} Appellant's second and third assignments of error raise common and interrelated issues; accordingly, we address the assignments together.

{¶18} Appellant argues the trial court erred in granting appellee's motion to modify a previous Qualified Domestic Relations Order where appellee did not meet the requirements of and did not comply with Civil Rule 60(B). Further, appellant maintains the trial court erred and abused its discretion in allowing appellee to file an amended QDRO to correct alleged errors in the original QDRO. We disagree.

{¶19} The QDRO is not an independent judgment entry of the court, but rather an enforcement mechanism pertaining to the court's previous judgment entry incorporating the parties' separation agreement. The original QDRO did not follow the terms of the

separation agreement and, as a result, did not comply with the court's August 18, 1992 Judgment and Decree.

{¶20} The Sixth District Court of Appeals addressed this issue in *Doolin v. Doolin* (1999), 123 Ohio App.3d 296. In *Doolin*, the wife filed a QDRO providing her with a greater portion of her husband's retirement plan than the Separation Agreement, incorporated into the court's judgment entry, provided her. The Sixth District found retirement benefits accumulated during a marriage are subject to property division in a divorce proceedings. Therefore, because the trial court did not reserve jurisdiction to modify the property division, the trial court lacked subject matter jurisdiction to adopt the QDRO, which modified the parties' separation agreement. As a result, the QDRO filed by the wife was void ab initio and could be vacated by the trial court in accordance with its inherent authority. Accordingly, husband's motion to vacate the QDROs did not have to comply with the general requirements for motions seeking relief from judgment.

{¶21} We agree with *Doolin* and find the trial court did not error in granting appellee's motion to modify the original QDRO, as the original QDRO filed by appellant was void due to its conflict with the terms of the parties' separation agreement incorporated by the trial court in its final judgment and decree.

{¶22} The second and third assignments of error are overruled.

{¶23} The February 2, 2004 Judgment Entry of the Tuscarawas Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

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JUDGES

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

SYLVIA JANE HIMES

Plaintiff-Appellant

-vs-

KENNETH HIMES

Defendant-Appellee

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JUDGMENT ENTRY

Case No. 2004AP020009

For the reasons stated in our accompanying Memorandum-Opinion, the February 2, 2004 Judgment Entry of the Tuscarawas Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES