[Cite as *Blair v. Blair*, 2016-Ohio-256.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
PAULDING COUNTY

DAVID K. BLAIR,

PLAINTIFF-APPELLANT, **CASE NO. 11-15-04**

v.

MARILYN BLAIR, **O P I N I O N**

DEFENDANT-APPELLEE.

Appeal from Paulding County Common Pleas Court
Domestic Relations Division
Trial Court No. DIV06-081

Judgment Reversed and Cause Remanded

Date of Decision: January 25, 2016

APPEARANCE:

James E. Hitchcock **for Appellant**

PRESTON, J.

{¶1} Plaintiff-appellant, David K. Blair ("David"), appeals the July 14, 2015 judgment entry of the Paulding County Court of Common Pleas denying his motion to vacate the Qualified Domestic Relations Order ("QDRO") issued by the trial court. For the reasons that follow, we reverse.

{¶2} The trial court issued a divorce decree on September 27, 2006, granting David a divorce from defendant-appellee, Marilyn Blair ("Marilyn"). (Doc. No. 15). Concerning the division of retirement benefits, the divorce decree provides:

> David Blair has retirement benefits due at his place of employment. Marilyn Blair would be entitled to one-half of the marital portion of Mr. Blair's retirement benefits. The same are to be set off to her through a QDRO. The marital portion of the retirement benefits mean that she is entitled to one-half of the accumulated retirement benefits from either the date of marriage or the date of his commencement of employment whichever is later in time to the date of filing of the divorce to wit: May 1, 2006.

(*Id.*, ¶ 10).

{¶3} Almost eight years later, Marilyn's counsel prepared a proposed QDRO and submitted it to David's counsel. (*See* Stipulation, Doc. No. 23). David's counsel responded to Marilyn's counsel, raising several objections to the proposed QDRO; however, when Marilyn's counsel was out of the office due to his wife's illness, his staff sent the proposed QDRO to the trial court without addressing David's attorney's objections and without serving a copy of it on David's attorney. (*See id.*).

{¶4} On August 1, 2014, the trial court issued the QDRO as submitted by Marilyn's attorney's staff. (Doc. No. 16). The QDRO provides, in pertinent part:

> E. The benefit to be paid from the Plan to the alternate payee pursuant to the participant's assignment of benefits, in compliance with Sections 401(a)(13) and 414 of the Internal Revenue Code of 1986, as amended (hereinafter referred to as "the Code"), shall be determined by multiplying the participant's accrued benefit under the Plan at the earlier of: (1) the time of the participant's retirement or (2) the time that the alternate payee elects to commence the receipt of benefits by a fraction the numerator of which is the number of months of the participant's credited service during the marriage (September 1, 1978 through July 17, 2006) and the denominator of which is the number of participant's total months of

> pension creditable service and multiplying the result by fifty percent (50.00%). However, the fraction described in the immediately preceding sentence shall not exceed the value of one (1).
>
> In addition, the alternate payee shall receive a pro-rata share of any post-retirement cost of living adjustments or other economic improvements made to the participant's benefits on or after the date of the participant's retirement. Such pro-rata share shall be calculated in the same manner as the alternate payee's share of the participant's retirement benefits as set forth in the immediately preceding paragraph.

(*Id.*).

{¶5} On December 29, 2014, David filed a motion requesting an order vacating the QDRO or, in the alternative, "modifying the terms of the order to bring the order in line with the law to wit: preventing the alternate Payee from receiving a part of the post-divorce increase in Participant's pension benefits." (Doc. No. 19). David filed an amended motion on January 9, 2015, requesting the same relief. (Doc. No. 20). On March 23, 2015, Marilyn filed a memorandum in opposition to David's motion to vacate the QDRO. (Doc. No. 24). On April 1, 2015, David filed a reply memorandum in support of his motion to vacate the

QDRO. (Doc. No. 25). On July 14, 2015, the trial court filed its judgment entry denying David's motion to vacate the QDRO.[1] (Doc. No. 26).

{¶6} David filed his notice of appeal on August 7, 2015. (Doc. No. 27). He raises four assignments of error for our review, which we consider together.[2]

Assignment of Error No. I

> **The trial court failed to consider that post-divorce Plaintiff's employer changed. It appears his Union also changed. A new pension formula was negotiated by new parties post-divorce. The pension increase was a post-divorce event not a continuation of an existing pension.**

Assignment of Error No. II

> **The trial court failed to consider that the Plaintiff's pension calls for a pension based on a lineal increase. His pension does not increase on an accelerating curve. A post-divorce increase should not have been awarded to the Defendant.**

Assignment of Error No. III

> **The trial court failed to give any weight to the last sentence of Paragraph 10 of the Divorce Decree. To wit:**
>
> > **"the marital portion of Mr. Blaire's [sic] retirement benefits mean she is entitled to one-half of the accumulated retirement benefits from either the date of the marriage or date of commencement of employment whichever is later in time to the date of filing of the divorce to wit: May 1, 2006."**

[1] Although the trial court denied David's motion, in its judgment entry, the trial court ordered that Marilyn's counsel submit an amended QDRO "to correct the end date of the marriage to May 1, 2006 instead of July 17, 2006." (Doc. No. 26).

[2] Marilyn failed to file an appellee's brief in this appeal. "Under those circumstances, App.R. 18(C) provides that we 'may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.'" *Cichanowicz v. Cichanowicz*, 3d Dist. Crawford No. 3-13-05, 2013-Ohio-5657, ¶ 63, fn. 7, quoting *Heilman v. Heilman*, 3d Dist. Hardin No. 6-12-08, 2012-Ohio-5133, ¶ 16.

Assignment of Error No. IV

> **There was no reservation of jurisdiction in the original Divorce Decree to modify the original pension division. The trial courts [sic] therefore could not award movant more of the pension than what was in existence on May 1, 2006, the date of division specified in the pension agreement. In this case, at the time of the divorce, Mr. Blair had been working at what was then Defiance Precision Products 26.6 years. He continued to work for them after the divorce. Significantly after the divorce Defiance Precision Products went out of business and its assets were acquired by GT Technologies.**

{¶7} Under his assignments of error, David argues that the trial court erred by denying his motion to vacate the QDRO because, according to David, the QDRO modifies the property division established in the divorce decree. Specifically, David argues that the QDRO, which employs a "sliding coverture fraction" that "results in improper overpayment to [Marilyn]," is contrary to the explicit terms of the divorce decree, which David argues provides for the use of a "fixed coverture method" and "clearly limits [Marilyn] to benefits that occurred during the marital time frame and specifically by its language excludes benefits that are earned post-divorce." (Appellant's Brief at 16, 19, 20). In other words, David argues, the QDRO should be "drafted in such a way as it determines the pension value at the date of the divorce." (*Id.* at 19).

{¶8} "Retirement benefits acquired during a marriage are a marital asset that must be divided equitably between the spouses in a decree of divorce that

terminates the marriage." *Kingery v. Kingery*, 3d Dist. Logan No. 8-05-02, 2005-Ohio-3608, ¶ 8, citing *McKinney v. McKinney*, 142 Ohio App.3d 604, 608 (2d Dist.2001). The Supreme Court of Ohio established in *Hoyt v. Hoyt* that, generally, "the most equitable method of dividing pension benefits is the [traditional] coverture fraction method." *See Cox v. Cox*, 12th Dist. Warren No. CA98-04-045, 1999 WL 58098, *4 (Feb. 1, 1999), citing *Hoyt v. Hoyt*, 53 Ohio St.3d 177, 183 (1990). Under the traditional coverture method, or percentage method—to which David refers as the "sliding coverture method"—"a court determines the amount of money due the non-participant spouse by using the value of the pension at retirement to determine the 'monthly accrued benefit.'" *Cameron v. Cameron*, 10th Dist. Franklin No. 12AP-349, 2012-Ohio-6258, ¶ 18. "The court then multiples this monthly accrued benefit by the traditional coverture fraction, which employs a 'ratio of the number of years of employment of the employed spouse during the marriage to the total years of his or her employment' to arrive at the marital portion of the pension benefit." *Id.*, quoting *Hoyt* at 182. "The non-participant spouse then receives his or her percentage share of that marital portion." *Id.*, citing *Hoyt* at 182. "By waiting and using the value of the pension at retirement, this method awards the non-participant spouse any post-divorce increase in the value that is attributable to the non-participant's share." *Id.*, citing *Thompson v. Thompson*, 196 Ohio App.3d 764, 2011-Ohio-6286, ¶ 39

(10th Dist.). "Accordingly, where the eventual, matured monthly payments are greater, due to the participant spouse's working after the divorce, than if he or she had retired the day of the divorce, then the non-participant's monthly benefit would be greater as well." *Id.*, citing *Thompson* at ¶ 34.

{¶9} The Court in *Hoyt* also "noted that 'flat rules have no place in determining a property division'" and acknowledged the existence of alternatives to the traditional coverture fraction method. *Id.* at ¶ 28, quoting *Hoyt* at 180. For example, "[u]nder the frozen coverture method, or dollar amount"—to which David refers as the "fixed coverture method"—"the trial court 'freezes' the pension benefits at the amount in the account as of the divorce date." *Id.* at ¶ 17. "Sometimes called the 'hypothetical' approach, [the frozen coverture method] calculates the value of the participant spouse's retirement account had he or she retired on the same day the parties divorced, using the then-present base pay and years of service." *Id.*, citing *Reising v. Reising*, 2d Dist. Clark No. 2010 CA 92, 2012-Ohio-1097, ¶ 24. "Under this approach, the non-participant spouse receives no interest the account accrues after that date." *Id.*

{¶10} Once a division of property is established in the divorce decree, that property division "is not subject to future modification by the court except upon the express written consent or agreement to the modification by both spouses." R.C. 3105.171(I). Absent "the express written consent or agreement to the

modification by both spouses," the trial court lacks jurisdiction to modify or amend the marital property division, including the division of retirement benefits, established in the divorce decree. *See Kingery* at ¶ 8; *Hines v. Hines*, 3d Dist. Marion No. 9-10-15, 2010-Ohio-4807, ¶ 11.

{¶11} However, "when the parties 'dispute, in good faith, the meaning of a provision in a decree, or if the provision is ambiguous, the trial court has the power to hear the matter, to resolve the dispute, and to enforce the decree.'" *Harrington v. Ford*, 10th Dist. Franklin No. 14AP-954, 2015-Ohio-3571, ¶ 11, quoting *Robins v. Robins*, 10th Dist. Franklin No. 04AP-1152, 2005-Ohio-4969, ¶ 13. "An ambiguity arises 'when a provision in an order or decree is reasonably susceptible of more than one meaning.'" *Kingery*, 2005-Ohio-3608, at ¶ 12, quoting *McKinney* at 609. "Should the trial court determine no ambiguity exists, the court must enforce the decree as written." *Cameron*, 2012-Ohio-6258, at ¶ 11, citing *Pierron v. Pierron*, 4th Dist. Scioto No. 07CA3153, 2008-Ohio-1286, ¶ 8. "If it determines an ambiguity exists, a court 'has the power to clarify and construe its original property division so as to effectuate its judgment.'" *Id.*, quoting *Borzy v. Borzy*, 9th Dist. Medina No. 3185-M, 2001 WL 1545676, *2 (Dec. 5, 2001). "To effectuate and enforce a divorce decree's division of a pension, a domestic relations court must enter an order such as a QDRO, a division of property order, or similar device." *Harrington* at ¶ 11, citing *Cameron* at ¶ 12. "As long as such

a device is consistent with the decree, it is not a modification of the decree." *Id.*, citing *Cameron* at ¶ 12, citing *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, ¶ 19.

{¶12} Accordingly, a trial court possesses jurisdiction to adopt a QDRO consistent with its divorce decree, but, absent "the express written consent or agreement to the modification by both spouses," it may not adopt a QDRO that changes the division of property established in the decree. R.C. 3105.171(I). *See also Cameron* at ¶ 10-11; *Kingery* at ¶ 8-10; *Hines* at ¶ 11. A QDRO is inconsistent with a divorce decree when it modifies the division of retirement benefits ordered in the decree, and a QDRO modifies a division of retirement benefits when the QDRO varies from, enlarges, or diminishes the awards the trial court ordered in the decree. *Cameron* at ¶ 13, citing *Knapp v. Knapp*, 4th Dist. Lawrence No. 05CA2, 2005-Ohio-7105, ¶ 40.

{¶13} The initial determination of whether a divorce decree is ambiguous presents a question of law that we review de novo. *Martin v. Howard*, 4th Dist. Lawrence No. 07CA27, 2009-Ohio-67, ¶ 8, citing *Pierron* at ¶ 8; *Oberst v. Oberst*, 5th Dist. Fairfield No. 09-CA-54, 2010-Ohio-452, ¶ 24, citing *Barnes v. Barnes*, 5th Dist. Stark No. 2003CA00383, 2005-Ohio-544, ¶ 18. *See also Pierron* at ¶ 8 ("[W]here no ambiguity exists, both the trial court and this court are required to apply it as written, i.e., as a matter of law."). "De novo review is independent and

without deference to the trial court's determination." *Larson v. Larson*, 3d Dist. Seneca No. 13-11-25, 2011-Ohio-6013, ¶ 8. "If we determine that an ambiguity exists, we then must afford the trial court discretion to clarify the intent of the agreement." *Enyart v. Taylor*, 4th Dist. Lawrence No. 13CA2, 2013-Ohio-4893, ¶ 13, citing *Martin* at ¶ 8.

{¶14} Here, the first question is whether the divorce decree is ambiguous regarding the division of David's retirement benefits. If not, the trial court must enforce the decree as written, and we must determine whether the QDRO enforces the unambiguous terms of the divorce decree. *See Cameron* at ¶ 14, citing *Butcher v. Butcher*, 8th Dist. Cuyahoga No. 95758, 2011-Ohio-2550, ¶ 12. If we conclude that the divorce decree is ambiguous, then we must analyze whether the trial court acted within its discretion in clarifying the terms of the divorce decree via the QDRO. *See Enyart* at ¶ 13, citing *Martin* at ¶ 8.

{¶15} We hold that the terms of the divorce decree concerning division of the retirement benefits are unambiguous. Four phrases in the paragraph of the divorce decree dividing the retirement benefits demonstrate—particularly when read together—that the divorce decree is unambiguous in its division of retirement benefits. First, the divorce decree states that David "*has* retirement benefits *due* at his place of employment." (Emphasis added.) (Doc. No. 15, ¶ 10). The use of the words "has" and "due" reflect that the pool of retirement benefits subject to

division are those retirement benefits due and owing as of the date specified in the divorce decree. "Has" is the present-tense, third-person singular form of the verb "have." *Webster's Third New International Dictionary* 1036 (2002). Black's Law Dictionary describes the adjective "due" as "[o]wing or payable; constituting a debt." *Black's Law Dictionary* 609 (10th Ed.2014). Webster's Third New International Dictionary defines "due" as "owed or owing as a debt" and "having reached the date at which payment is required." *Webster's* at 699. Therefore, the statement that David "*has* retirement benefits *due*" indicates that the retirement benefits that are the subject of the divorce decree's property division are the retirement benefits owing or payable to David as of May 1, 2006—the date specified in the decree. *See Oberst* at ¶ 34.

{¶16} Second, the paragraph of the divorce decree dividing David's retirement benefits also states that Marilyn "*is* entitled to one-half of the accumulated retirement benefits." (Emphasis added.) (Doc. No. 15, ¶ 10). The use of the word "is" reflects that the division of retirement benefits *is* to occur as of the date of filing of the divorce, not at some future date. *See Oberst*, 2010-Ohio-452, at ¶ 34. "Is" is the present-tense, third-person singular form of the verb "to be." *State v. Pittman*, 3d Dist. Marion No. 9-13-65, 2014-Ohio-5001, ¶ 19, citing *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150, ¶ 30; *Webster's* at 1197. "It is something in being in the present

as opposed to the past or the future." *Dernier* at ¶ 30. Accordingly, the use of the word "is" reflects that the division of retirement benefits is effective as of the date specified in the divorce decree. *See Oberst* at ¶ 34 ("[The divorce decree] states, 'The pension plan of the defendant's *is to be* equally divided by a QDRO.' (Emphasis added). While the parties could have agreed to a future date in the divorce decree, they did not. As such, we hold the divorce decree unambiguously states that the Appellee's pension plan is to be equally divided effective as of the termination of the marriage * * *.").

{¶17} Third, the paragraph of the divorce decree dividing David's retirement benefits states that Marilyn "is entitled to one-half of the *accumulated* retirement benefits." (Emphasis added.) (Doc. No. 15, ¶ 10). The use of the word "accumulated" refers to retirement benefits that a party would be entitled to receive as of a particular date. *See Cox*, 1999 WL 58098, at *4; *Martin*, 2009-Ohio-67, at ¶ 11-12. "Accumulate," when used as an adjective, means "heaped or piled up." *Webster's* at 13. A synonym of the adjective "accumulate" is "accumulated." *Id.* Therefore, by modifying "retirement benefits" with the adjective "accumulated," the divorce decree makes clear that the retirement benefits to be divided are those that have been accumulated—or "heaped or piled up"—as of the date specified in the decree. The Twelfth District Court of Appeals reached a similar conclusion in *Cox*. There, the court stated that "[t]he term

'accrued benefits' refers to retirement benefits a party would be entitled to receive as of a particular date" and that "this language mandates a calculation of what [the pension-holder's] benefits would have been had he stopped earning * * * benefits as of [the date specified in the decree]." *Cox* at *4, citing *George v. George*, 9th Dist. Summit No. C.A. 18866, 1998 WL 663221, *3 (Sept. 23, 1998). The Fourth District Court of Appeals reached the same conclusion in *Martin*. *Martin* at ¶ 11-12 ("The divorce decree provides that 'each party shall receive 50% of the other parties' retirement accrued as of November 21, 2003. * * * Under the clear and unambiguous terms of the provision, Ms. Martin is entitled to receive 50% of Mr. Howard's retirement 'accrued' as of November 21, 2003."). "Accrued" and "accumulated" are synonyms. *See* William C. Burton, *Burton's Legal Thesaurus*, 9 (3d Ed.1998). Accordingly, we find *Cox* and *Martin* persuasive.

{¶18} Fourth, the divorce decree states that Marilyn "is entitled to one-half of the accumulated retirement benefits *from* either the date of marriage or the date of his commencement of employment whichever is later in time *to* the date of filing of the divorce to wit: May 1, 2006." (Emphasis added.) (Doc. No. 15, ¶ 10). The use of a specified date range—"from * * * to * * *"—in the divorce decree provides dates certain from which retirement benefits are to be calculated. *See Cameron*, 2012-Ohio-6258, at ¶ 24-25. "In such circumstances, 'courts have held that if there is a date certain or language suggesting that the [traditional]

coverture method is not appropriate, then benefits should be calculated according to the benefits as they existed at the time of the divorce because to do otherwise constitutes a modification of the divorce decree itself.'" *Cameron* at ¶ 25, quoting *Doerfler v. Doerfler*, 162 Ohio App.3d 585, 2005-Ohio-4066, ¶ 12 (10th Dist.). *See also Cox* at *4. Here, as analyzed above, the divorce decree contains dates certain and language suggesting that the traditional coverture method is not appropriate.

{¶19} For the reasons above, the divorce decree unambiguously provides for the use of a frozen coverture fraction, meaning that Marilyn's share of David's retirement benefits, accumulated during the period specified in the divorce decree, is to be calculated as of the date specified in the divorce decree—May 1, 2006.

{¶20} We next analyze whether the trial court's QDRO enforces the unambiguous terms of the divorce decree. *See Cameron* at ¶ 14, citing *Butcher*, 2011-Ohio-2550, at ¶ 12. We hold that it does not. Whereas the divorce decree unambiguously employs a frozen coverture fraction, as discussed above, the QDRO employs a traditional coverture fraction. *Compare id.* at ¶ 18 *with* Doc. No. 16, ¶ E. In its judgment entry denying David's motion to vacate or modify the QDRO, the trial court concluded that the language of the divorce decree is unambiguous, but it erroneously concluded that the QDRO is consistent with the decree. (*See* Doc. No. 26 at 5). Rather than conduct an analysis of the language

of the divorce decree, the trial court examined case law concerning methods by which trial courts may divide pension benefits. (*See id.* at 2-5, citing *Hoyt*, 53 Ohio St.3d 177 and *Layne v. Layne*, 83 Ohio App.3d 559 (2d Dist.1992)). The question is not which pension-division method the trial court should have used in the divorce decree but rather "whether the trial court's [QDRO] merely enforced the decree or instead impermissibly modified it." *Cameron* at ¶ 29.

{¶21} For the reasons above, the QDRO impermissibly modifies the terms of the property division set forth in the divorce decree, and the trial court erred by issuing the QDRO and by denying David's motion to vacate or modify it.

{¶22} David's assignments of error are sustained.

{¶23} Having found error prejudicial to the appellant herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment Reversed and
Cause Remanded

SHAW, P.J. and ROGERS, J., concur.

/jlr