Opinion issued October 30, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00375-CV

NORMA VENSO, Appellant

v.

GARY WILLIAM HORTON, Appellee

On Appeal from County Court at Law No. 3
Galveston County, Texas
Trial Court Cause No. 05FD2676

MEMORANDUM OPINION

Appellant, Norma Venso, appeals from the decree rendered in her divorce from appellee, Gary William Horton.

In her sole issue, appellant contends that the decree contains a provision that violates the Employee Retirement Income Security Act ("ERISA"), *see* 29 U.S.C. § 1056(d)(1), (d)(3)(F) (2006), or constitutes an "illegal or legally incomplete contract under Texas Law."

We dismiss.

Background

In 1995, Venso and Horton were married. In 1997, Horton retired from his 29-year position with the AFL-CIO, and he began collecting his pension under the AFL-CIO Staff Retirement Plan ("the Plan"). At the time he retired, Horton was required to designate a beneficiary, if any, of the survivor's benefit under the Plan. Horton designated Venso to receive the survivor's benefit. To accommodate his election, Horton was assessed $3000 annually by the Plan.

In 2005, Venso petitioned for divorce from Horton. On December 11 and 12, 2006, at a bench trial, Venso and Horton testified in detail concerning the inventory and appraisement of their property. On December 13, 2006, the parties announced that they had reached an agreed property division, which they stated into the record.

Specifically, the parties agreed that each would retain his or her own retirement benefits. Specifically, Horton was to retain, inter alia,

> [t]he sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, Keogh plan, pension plan, employee stock option plan, 401k plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason of husband's past, present, or future employment, in the following plans: . . . [the Plan].

With regard to the survivor benefit under the Plan, Horton testified that he now wanted the benefit to go to his children from a prior marriage, rather than to Venso, but that the Plan would not allow Horton to re-assign the survivor benefit. In lieu of a re-assignment, Venso agreed that she would sign a contract concerning any survivor benefit she received. Venso's counsel stated as follows:

> And there's one more thing I forgot to mention. Mr. Horton's pension that he says that he cannot revoke the survivorship benefit to Miss Venso. She has agreed that she will sign a separate contract agreeing that if she receives that benefit—having survived him—then she will give that money to his two children [of a prior marriage], 50/50.

The trial court determined that the parties were satisfied with the property settlement and approved the agreement.

Ultimately, however, the parties were unable to agree on the precise terms of the separate agreement concerning Horton's pension.

On January 8, 2007, Venso moved for entry of judgment on the decree and appended a proposed decree, which contained the following provision:

> IT IS FURTHER ORDERED, as the parties have agreed, that [Venso] will assign the survivor's benefit from [Horton's] AFL-CIO Staff Retirement Plan, if any, to be payable in equal parts to [Horton's children]. If [Venso] survives [Horton], and the AFL-CIO refuses to assign the survivor benefit to any others, it shall remain payable to [Venso].

At a clarification hearing the same day, Horton objected that the provision in the proposed decree did not reflect the parties' previous agreement. Specifically, Horton complained that the provision, as worded, made the benefit payable to Venso if the Plan refused to re-assign the benefit and that it had already been established that the Plan would not re-assign the benefit. Horton suggested that the Plan deduct the taxes prior to sending the funds to Venso and that Venso distribute the remaining funds to Horton's children each month. Venso maintained that, although she would not interfere with the benefit being re-assigned to Horton's children, she could not have the funds come to her as income and then give the funds to the children.[1]

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[1] Venso explained that, if the survivor benefit came to her and then she distributed the funds to the children, the funds would be considered her income, which would carry tax liability consequences for her and could jeopardize her eligibility for certain benefits in the distant future. Venso explained that she could waive her right to receive the benefit but that such action would not revert the benefit to Horton; rather, under the Plan, Venso's portion of the benefit would simply be lost.

On January 25, 2007, Venso again moved for entry of the final decree. At a hearing, the parties continued to disagree concerning the disposition of the survivor's benefit. Stated generally, the trial court directed that an interest-bearing account be set up, into which the survivor's benefit would be deposited, and the applicable taxes would be withheld. Venso would then send the remaining funds in equal proportions to Horton's children. The court also directed that if the parties later found that the benefit could be assigned directly to the children through a qualified domestic relations order ("QDRO"), "then that is the way it should be done."

On the morning of January 31, 2007, Venso formally withdrew her consent to the decree on the basis that the court had modified the terms of the decree. Later that day, however, the trial court signed a final decree, in which the language concerning the interest-bearing account was deleted and the following was substituted and initialed by the parties' counsel:

> IT IS ORDERED[,] as the parties agreed[,] that [Venso] sign a contract in which she agrees that if she receives the survivor's benefit having survived him [sic] from [Horton's] pension she will give that money to the children of [Horton], 50/50, or their heirs.

It is this language that is the subject of this appeal.

On February 20, 2007, Venso moved for a new trial, contending that the language requiring her to make a separate contract for the benefit of Horton's children violated ERISA. In addition, Venso contended that, as a matter of law, an

agreement to re-assign the survivor benefit could only be effectuated through a QDRO. Venso asked the trial court to grant a new trial or modify its decree to replace the language requiring her to execute a separate contract with language that a QDRO be effectuated instead. After a hearing, the trial court denied Venso's motion but directed that a QDRO be prepared by Venso's attorney.

On April 23, 2007, the parties executed a QDRO, pursuant to which Horton's two children were "each awarded a 50% portion of any benefits payable" to Venso under the Plan.

Analysis

Appellant complains on appeal that the provision of the decree, in which she agreed to sign a contract stating that she would give to Horton's children any benefit she received under the Plan, violates ERISA or constitutes an "illegal or legally incomplete contract under Texas Law." We conclude that the issue presented is moot.

A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005). An appeal becomes moot "when a court's action on the merits cannot affect the rights of the parties." *Zipp v. Wuemling*, 218 S.W.3d 71, 73 (Tex. 2007); *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex.

1993). Generally, a party's completion of the actions at issue renders her appeal of that issue moot. *See Barrera v. State*, 130 S.W.3d 253, 260 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 236 (Tex. 1982)); *see also Labrado v. County of El Paso*, 132 S.W.3d 581, 589 (Tex. App.—El Paso 2004, no pet.) (similarly, a suit to enjoin the performance of a contract becomes moot once the contract has been performed); *Grant v. Grant*, 358 S.W.2d 147, 148 (Tex. Civ. App.—Waco 1962, no writ) (explaining that "[a]ppellate courts will not decide moot or abstract propositions" and that "[a] case, issue, or proposition is, or becomes moot or abstract, when it does not, or ceases to rest on any existing fact or right").

If there ceases to be a controversy between the parties because of events occurring after the trial court has rendered judgment, "the decision of an appellate court would be a mere academic exercise, and the court may not decide the appeal." *See Olson v. Comm'n for Lawyer Discipline*, 901 S.W.2d 520, 522 (Tex. App.—El Paso 1995, no writ). In such case, the appellate court is required to dismiss the cause. *See Gen. Land Office of Tex. v. OXY U.S.A., Inc*., 789 S.W.2d 569, 570 (Tex. 1990) (stating that if no controversy continues to exist between parties, appeal is moot and court of appeals must dismiss cause).

Here, Venso complains of the language in the decree stating, "IT IS ORDERED [,] as the parties agreed [,] that [Venso] sign a contract in which she agrees that if she receives the survivor's benefit having survived him [sic] from [Horton's] pension she will give that money to the children of [Horton], 50/50, or their heirs." The record shows that, after the decree was signed, the parties executed a QDRO, pursuant to which Horton's two children were "each awarded a 50% portion of any benefits payable" to Venso under the Plan. Hence, any rights Venso had to the survivor's benefit under the Plan were wholly assigned to Horton's children in the QDRO. *See* 29 U.S.C. § 1056(d)(1) (governing pension plan administration and providing that "[e]ach *pension plan* shall provide that benefits provided under the plan may not be assigned or alienated") (emphasis added); *id.* § 1056(d)(3) (providing that, as an exception to (d)(1), "Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any [QDRO]."); *id.* § 1056(d)(3)(G) (stating that plan determines qualified status of domestic relations order). Venso's completion of the action at issue renders her appeal of the issue moot. *See Barrera*, 130 S.W.3d at 260.

In addition, Venso specifically asserts in her brief on appeal that she "does not challenge the entry of the purported QDRO, and whatever legal effect that order may or may not create." Venso complains only that "[t]he trial court directed the entry of

such a QDRO without removing the objectionable provision of the decree," that portion requiring the parties "to make their own private contract about Ms. Venso's survivor benefit." Venso asks us to modify the trial court's decree by deleting the provision. Venso has not shown, however, that removing the provision, which concerns a benefit in which she no longer has any legal interest, would affect an existing right. *See VE Corp.*, 860 S.W.2d at 84; *Grant*, 358 S.W.2d at 148 (explaining that "a case, issue, or proposition is, or becomes moot or abstract, when it does not, or ceases to rest on any existing fact or right.").

Because Venso's right to receive the benefit has been wholly assigned to Horton's children, Venso has not shown that a controversy still exists. *See Gen. Land Office*, 789 S.W.2d at 570. If, at any stage of litigation, there ceases to be an actual controversy between the parties, a case becomes moot. *See Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737. We are prohibited from deciding moot controversies. *See Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999).[2] Jurisdiction

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[2] We recognize that there are two exceptions to the mootness doctrine, neither of which applies here: (1) the "capable of repetition yet evading review exception"; and (2) the "collateral consequences exception." *See Gen. Land Office of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). The former applies when the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot, and it has only been used to challenge unconstitutional acts performed by the government. *Id*. The latter is invoked only under narrow circumstances, when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006).

over the underlying lawsuit depends on justiciability, and for a controversy to be justiciable, there must be a real controversy between the parties that will actually be resolved by the judicial relief sought. *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245–46 (Tex. 1994).

Having determined that there is no longer an actual existing controversy between the parties with regard to the distribution of any survivor's benefit Venso receives under the Plan, we conclude that this appeal is moot. Accordingly, it must be dismissed. *See Gen. Land Office*, 789 S.W.2d at 570 (stating that if no controversy continues to exist between parties, appeal is moot and court of appeals must dismiss cause).

Conclusion

We dismiss the appeal as moot.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Nuchia and Higley.