NUMBER 13-15-00456-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JAMES ALLEN PELLOAT, **Appellant,**

v.

KATHERINE PELLOAT McKAY, **Appellee.**

On appeal from the 279th District Court of Jefferson County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

By what we construe as a total of five issues on appeal, pro se appellant James Allen Pelloat (James) appeals the trial court's signing of a qualified domestic relations order (QDRO) related to his former marriage to Katherine Bolenbaucher, formerly known as Katherine Pelloat McKay (Katherine). James asserts that (1) the trial court committed harmful error in ruling on various discovery matters; (2) the trial court committed harmful error in ruling on various pretrial matters; (3) the trial court committed harmful error in

incorporating a formula in the QDRO; (4) the trial court committed harmful error in ordering a disproportionate share of community property in the underlying divorce proceeding; and (5) Katherine's attorney defrauded him of additional money not discussed at the divorce trial. We affirm.

I. BACKGROUND[1]

James and Katherine married in 1987, and a final decree of divorce was signed in April of 2011. Three subsequent nunc pro tunc judgments were signed by the trial court in July and August of 2011 to "correct clerical errors in the transcription of the original divorce decree." *See Pelloat v. McKay*, No. 09-11-00643-CV, 2012 WL 5954114, at **1–2 (Tex. App.—Beaumont Nov. 29, 2012, pet. denied) (mem. op.). In the final divorce decree, the trial court ordered 37 percent of James's Teacher's Retirement Annuity as James's separate property and ordered the remaining 63 percent as part of the community estate. Furthermore, the divorce decree awarded Katherine "75% of the Community Property portion of the Teacher's Retirement Annuity from [James's] employment . . . ." and awarded James "25% of the Community Property Portion of the Teacher's Retirement Annuity from [James's] employment."

On November 29, 2012, the Ninth Court of Appeals in Beaumont affirmed the trial court's judgment, after limiting its review to purely procedural grounds rather than the merits. *See id.* at *2 n.1. On May 31, 2013, the Texas Supreme Court denied review, and the Ninth Court of Appeals issued its mandate affirming the divorce decree on July 11, 2013.

[1] This appeal was transferred from the Ninth Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

On February 26, 2015, Katherine filed a motion to enter a QDRO, and on July 20, 2015, Katherine filed an amended motion to enter a QDRO in order to "reflect [the] current Teacher Retirement System requirements." *See generally* TEX. FAM. CODE ANN. §§ 9.101–.106 (West, Westlaw through 2015 R.S.) (outlining the jurisdiction and procedures of entering post-divorce QDROs in Texas); TEX. GOV'T CODE ANN. §§ 804.001–.005 (West, Westlaw through 2015 R.S.) (defining and stating applicability of QDROs with regard to benefits payable by a public retirement system such as the Teacher Retirement System of Texas); *see also* 34 TEX. ADMIN. CODE §§ 47.1–.16 (Teacher Retirement Sys. of Tex., Qualified Domestic Relations Orders) (discussing the payment of Teacher Retirement System of Texas benefits under a QDRO).

On August 14, 2015, the trial court held a telephonic hearing on Katherine's amended motion to enter a QDRO, with Katherine appearing in person and through counsel, and James appearing telephonically and pro se from the C.T. Terrell Unit of the Texas Department of Criminal Justice's Institutional Division.[2] Prior to the hearing, the trial court denied various motions filed by James including: (1) a motion for jury trial; (2) a motion to dismiss Katherine's motion to enter a QDRO; and (3) a motion for a bench warrant.

At the hearing, the trial court took up two preliminary complaints from James. First, James asserted that he was not provided an opportunity to conduct discovery, which should make the case "null and void." The trial court noted that the record contained a document entitled "Disclosure Request to [Katherine's counsel] Melody M. Petit for [Katherine] dated June 1, 2015." In that document, James requested under rule of civil

[2] James has been imprisoned throughout the entirety of the proceedings in this case for reasons unclear from the record.

procedure 194.1 “information concerning items that are listed in the enclosed Exhibit—5” dealing with certain inventory; and he requested disclosure under rule of civil procedure 192.3(b). The trial court then asked whether James had proof that he had served these documents upon Katherine, and James did not. Second, James asserted that he had a pending counter-claim in this case regarding his alleged “community interest in” Katherine’s “retirement and a 401(k) plan.” The trial court denied James’s counter-claim, citing the final divorce decree, which specifically awarded Katherine her retirement accounts as “her sole and separate property,” which divested James of all rights, title, interest, and claims to such property.

At the conclusion of the hearing, the trial court signed the QDRO that directed distribution of James’s retirement benefits under the Teacher Retirement System of Texas as follows:

> Multiply the distribution by a percentage derived from the following formula:
>
> $$\text{CP awarded} \times \frac{\text{standard annuity based on salary and service during marriage}}{\text{standard annuity based on salary and service at the time of distribution.}}$$

The order further stated that “CP” in this case is “75.00%” which represents Katherine’s interest in the community property portion of James’s retirement annuity. This appeal followed.

II. DISCOVERY REQUESTS

By his first issue and third point of error, which we construe together, James asserts that the trial court erred by proceeding with the QDRO hearing despite his unanswered requests for discovery in this case.

A. Standard of Review

Generally, the scope of discovery is within a trial court's discretion. *In re Wal-Mart Stores, Inc.*, __S.W.3d __, 2016 WL 7230399, at *4 (Tex. App.—El Paso Dec. 14, 2016, orig. proceeding [mand. pending]) (citing *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003)).

B. Discussion

In this case, James argues that the trial court erred by not allowing him to properly conduct discovery in this case. The record shows that James attached discovery requests as an exhibit to his motion for a bench warrant and to his request for the court reporter to take notes of hearings and the trial. Nothing in the record shows that James specifically propounded such discovery requests to Katherine or her counsel.

"Receipt is an element of service." *See Strobel v. Marlow*, 341 S.W.3d 470, 476 (Tex. App.—Dallas 2011, no pet.) (citing *Payton v. Ashton*, 29 S.W.3d 896, 898 (Tex. App.—Amarillo 2000, no pet.)). A certificate of service under rule of civil procedure 21a is prima facie evidence that service took place. *See id.*; *see also* TEX. R. CIV. P. 21a (outlining permitted methods of service). This presumption vanishes if the opposing party offers proof of non-receipt, and when the presumption is challenged, it must be proved according to the rule. *Id.*

Here, nothing in the record shows that Katherine actually received the discovery requests, which is an element of service. *See Strobel*, 341 S.W.3d at 476. Instead, the record shows that the discovery requests were sent to the trial court clerk, and James stated at the hearing that he sent Katherine's attorney a copy of the requests. As none of the prerequisites for prima facie proof of service were met, and the rule's requirements are neither vague nor onerous, we decline to expand them this far as James urges. *See*

Mathis v. Lockwood, 166 S.W.3d 743, 745 (Tex. 2005). We hold that the trial court did not abuse its discretion in moving forward with the QDRO hearing despite James's request to conduct discovery. James' first issue is overruled.

III. NOTICE OF HEARING

By his second issue and first and second points of error, which we construe together, James asserts that the trial court erred in failing to provide him notice of what would be discussed at the telephonic hearing, leaving him unprepared to proceed. Katherine responds to James's second issue by arguing that James failed to preserve error. We agree.

Generally, as a prerequisite to presenting a complaint for appellate review, the record must show that a complaint was made to the trial court, and that the trial court must rule on the complaint. TEX. R. APP. P. 33.1(a). Our review of the record does not show that James specifically complained to the trial court in order to preserve error on this point. As a result, we find that this issue was waived. We overrule James's second issue.

IV. QDRO

By his third issue and fifth point of error, James complains about the formula incorporated by the trial court in the QDRO.

A. Applicable Law and Standard of Review

QDROs are a "species of post-divorce enforcement" orders. *See Beshears v. Beshears*, 423 S.W.3d 493, 500 (Tex. App.—Dallas 2014, no pet.). The purpose of a QDRO is to create or recognize an alternate payee's right, or to assign an alternate payee the right, to receive all or a portion of the benefits payable to a participant under a retirement plan. *Id.* Furthermore, a QDRO is a final, appealable order. *Id.*

We review the trial court's ruling on a post-divorce motion for enforcement under an abuse-of-discretion standard. *See Gainous v. Gainous*, 219 S.W.3d 97, 103 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

B. Discussion

James argues that the trial court utilized an erroneous formula into the QDRO.

A trial court retains continuing subject-matter jurisdiction to clarify and to enforce the decree's property division. *See Gainous*, 219 S.W.3d at 106 (citing TEX. FAM. CODE ANN. §§ 9.002; 9.008 (West, Westlaw through 2015 R.S.)). Concurrent to that power, a trial court also has continuing, exclusive jurisdiction to render an enforceable QDRO permitting payment of a pension, retirement plan, or other employee benefits divisible under the law of this state or of the United States to an alternate payee or other lawful payee**.** TEX. FAM. CODE ANN. § 9.101(a). A party may petition the court for a QDRO in two circumstances: (1) the court has not previously issued a QDRO or similar order permitting payment of benefits from a pension, retirement, or other employee-benefits plan; or (2) the plan administrator (or person acting in equivalent capacity) has determined that a previously entered QDRO does not satisfy the requirements for a QDRO. *Gainous*, 219 S.W.3d at 106–07.

Here, as part of the division of community property, the divorce decree awarded Katherine a just-and-right 75-percent share of the community interest portion of James's Teacher Retirement account. The trial court's QDRO order imposes the following formula: Katherine's community property interest in the community property share of James's Texas Teacher Retirement Account x [(Standard annuity based on salary and service during marriage) ÷ (Standard annuity based on salary and service at the time of

distribution)]. James testified at the hearing that he retired in the year 2000 and the parties divorced in 2011. As a result, this formula does not run afoul of invading post-divorce separate property as the Texas Supreme Court warned about in *Berry v. Berry*. *See* 647 S.W.2d 945, 947 (Tex. 1983) ("These post-divorce [retirement] increases cannot be awarded to Mrs. Berry, for to do so would invade Mr. Berry's separate property, which cannot be done."). In this case, the formula tracks the formula stated in *Taggart v. Taggart*, which allows a spouse to collect retirement benefits for the period that they were married divided by the total amount of time that would entitle James to retirement, then multiply that figure by Katherine's award of 75-percent interest in the community property share of James's retirement account. *See* 552 S.W.2d 422, 424 (Tex. 1977). Accordingly, we hold that the trial court did not abuse its discretion by rendering the QDRO. James's fourth issue is overruled.

V. COMMUNITY PROPERTY DIVISION

By his fourth issue and fourth point of error, which we construe together, James collaterally attacks the division of community assets in the final divorce decree.

A. Res Judicata

Res judicata applies to a final divorce decree to the same extent that it applies to any other final judgment. *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990). If an appeal is not timely perfected from the divorce decree, res judicata bars a subsequent collateral attack. *Id.* A collateral attack does not attempt to secure the rendition of a single, correct judgment in place of a former one, but, instead, seeks to avoid the effect of a judgment through a proceeding brought for some other purpose. *Gainous*, 219 S.W.3d at 105. The doctrine of res judicata applies even if the divorce decree improperly divided the property.

See Baxter, 794 S.W.2d at 762. Errors other than lack of jurisdiction render the judgment merely voidable and must be attacked within the prescribed time limits. *Id.* In other words, to prevail on a collateral attack, the party must show that the complained-of judgment was void. *See id.*

The divorce decree in this case was final on July 11, 2013, when the Ninth Court of Appeals issued its mandate affirming the trial court's divorce decree. Furthermore, nothing in the record or in James's arguments to this Court indicate that the divorce decree was void. As a result, we hold that James's collateral attack on the final divorce decree is barred by res judicata. *See id.* We overrule James's fourth issue.

VI. ALLEGED VIOLATIONS BY KATHERINE'S ATTORNEY

By his fifth issue and sixth point of error, which we construe together, James complains about actions taken by Katherine's attorney with respect to the QDRO.

Generally, as a prerequisite to presenting a complaint for appellate review, the record must show that a complaint was made to the trial court, and the trial court must rule on the complaint. *See* TEX. R. APP. P. 33.1(a). Our review of the record does not show how James specifically complained to the trial court in order to preserve error on this point. As a result, we find that this issue is waived.

Even assuming without deciding that the issue was preserved for our review, Texas Rule of Appellate Procedure 38.1(i) requires an appellant to make clear and concise arguments for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). While we are aware that James is acting pro se in this appeal, pro se litigants are held to the same standards as licensed attorneys. *Brown v. Tex. Empl't Comm'n*, 801 S.W.2d 5, 8 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

Rather than follow rule 38.1(i), James's argument on this issue revolves around innuendo and unsubstantiated allegations against Katherine's attorney and her preparation of the QDRO. As a result, James's argument is also waived. We overrule James's fifth issue.

VII. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
1st day of June, 2017.