STATE OF MICHIGAN

COURT OF APPEALS

RICHARD ALAN MYERS,

Plaintiff-Appellee,

v

NANCY ANN MYERS,

Defendant-Appellant.

UNPUBLISHED
August 23, 1996

No. 170392
LC No. 92434466 DM

Before: Markman, P.J., and Marilyn Kelly and L.V. Bucci,* JJ.

PER CURIAM.

Defendant appeals as of right from the parties' judgment of divorce. She argues that the trial court entered a judgment that did not conform with the parties' settlement on the record. She requests the matter be remanded to a different judge, as the original judge was biased against her and forced her into a settlement. Moreover, she seeks attorney fees and costs, because she has been unnecessarily forced to litigate a mathematical error in the judgment which opposing counsel could have corrected below. We reverse.

I

Plaintiff filed a complaint for divorce on May 28, 1992. After one day of trial, the parties reached a settlement that was placed on the record. It provided that each marital asset be assigned a monetary value. The parties would then divide the assets, each getting the same total value. It was further agreed that both would receive property that would provide them with liquidity. The agreement was silent as to which party would receive which assets.

Both had a pension plan. They agreed to have the plans valued as of December 31, 1991. The party with the more valuable pension was to have the option of either (1) paying to the other one half of the difference between the plans, or (2) obtaining a Qualified Domestic Relations Order (QDRO) which would give the other one half the difference in value between the plans.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Furthermore, the parties agreed to take $50,000 from the marital estate and establish a fund for their daughter's undergraduate college education. The fund was not intended to be a formal trust agreement. Rather, plaintiff was to administer it in association with the Roney Stock Brokerage Company. Defendant was to have the right to advise, consent and veto plaintiff's decisions with respect to the portfolio. Any disagreements that could not be resolved would be submitted to a mutually agreed upon third party investment advisor.

On April 21, 1993, plaintiff filed a proposed consent judgment of divorce and property settlement which provided for a specific distribution of the marital assets. Defendant filed objections, arguing that it did not conform to the settlement previously placed on the record.

At a May 5, 1993, hearing, defendant argued that, contrary to the settlement, the consent judgment assigned each party the full value of his or her respective pension plan. Defendant asserted that the settlement provided that she had the option of transferring an interest in her plan by means of a QDRO, because her plan was more highly valued.

Defendant also argued that, contrary to the settlement, she was forced to take a majority of her distribution in non-liquid assets. Finally, she alleged that the proposed judgment allowed plaintiff to unilaterally determine which assets were to be placed in the college fund. It omitted her right to advise, consent and veto plaintiff's management of the portfolio.

At the hearing, the parties agreed to attempt to agree to a QDRO with respect to defendant's pension plan. Plaintiff admitted that, if a QDRO evenly dividing defendant's pension were possible, the marital assets would have to be redistributed in order to achieve a 50-50 split. The trial court held that the rest of the proposed property distribution conformed with the previous settlement.

On May 6, 1993, plaintiff filed a new motion for entry of a proposed judgment. It included a footnote which indicated that, if defendant's pension plan could be subject to a QDRO, it would be divided equally between the parties. It further provided:

> If this occurs, an amount equal to the plaintiff's portion of the present value of the QDRO shall be reallocated from Plaintiff to Defendant out of Section C (Stocks and Bonds) or Section D (Cash Savings) with Defendant having the right to designate the items to be reallocated.

Defendant responded that she had been assured that her pension plan could be subject to a QDRO. The trial court instructed plaintiff to submit a proposed judgment incorporating the property settlement into the body of the judgment, because it had to be signed by both parties.

Plaintiff submitted the proposed judgment on May 12, 1993. Defendant submitted a proposed QDRO distributing part of her pension to plaintiff. She objected to the revised order arguing that the footnote should be deleted and the assets described in it reallocated to her, because the settlement no longer contained an equal division of the marital estate.

The trial court entered plaintiff's consent judgment, deleting the footnote. However, the assets were not redistributed. Defendant moved for reconsideration, arguing that, because the footnote had been deleted and her pension was divided equally between the parties by a QDRO, plaintiff received a greater percentage of the parties' assets. Plaintiff responded that the judgment was proper. The trial court denied the motion.

II

We agree with defendant that the trial court erred in entering a judgment that did not conform to the original settlement. Property settlements placed on the record and consented to by the parties are not to be modified in the judgment of divorce absent fraud, duress or mutual mistake. *McBride v Foutch*, 140 Mich App 837, 844; 366 NW2d 58 (1985). A stipulation of the parties must be reflected in the final judgment of divorce. *Kline v Kline*, 92 Mich App 62, 78; 284 NW2d 488 (1979).

The consent judgment entered here did not conform to the settlement in several respects. First, the judgment did not effect an equal distribution of the marital assets. Because a QDRO was entered, the judgment awards plaintiff $42,942 more in assets than defendant. The trial court did not properly order a redistribution of the assets to account for the QDRO.

Moreover, the judgment does not conform to the parties' settlement agreement with regard to the issue of liquidity. A liquid asset is one that can be quickly acquired or disposed of without danger of intervening loss in nominal value. Black's Law Dictionary (6th ed). Virtually all of the liquid assets were awarded to plaintiff, contrary to the division contemplated by the settlement.

With regard to the college fund, it is apparent from the record that plaintiff was to be given the authority to manage the fund. However, defendant was to have the right to advise, consent and veto plaintiff's actions. The consent judgment was nonconforming, because it allowed plaintiff to unilaterally manage the fund, omitting defendant's right to advise and consent.

III

Defendant argues that the case should be remanded to a different judge, because the original judge was biased against her and forced her into a settlement. We decline the request.

Defendant alleged that the coercive behavior occurred on or before March 8, 1993. However, defendant did not seek disqualification until May 4, 1993. The motion was untimely, as it was not filed within fourteen days from the time of the discovery of the grounds for disqualification. MCR 2.003(C)(1). Untimeliness is a factor to be considered in determining whether a judge should be disqualified. *Band v Livonia Assoc*, 176 Mich App 95, 118; 439 NW2d 285 (1989).

Furthermore, defendant failed to raise the issue at the May 5, 1993 hearing. Thus, the trial court never had the opportunity to consider the issue. Defendant's failure to raise the issue despite numerous

motions over which the judge presided after May 5, 1993, constitutes tacit approval of the judge and waiver of the disqualification issue. *Reno v Gale*, 165 Mich App 86, 90-91; 418 NW2d 434 (1987).

Even assuming that the trial judge would have denied the motion, defendant waived the issue by failing to request review by the chief judge. MCR 2.003(C)(3)(b); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). Under these circumstances, we decline to remand the matter to a different judge.

IV

Finally, defendant argues that she should be awarded attorney fees and costs pursuant to MCR 7.216(C)(1)(b), which deals with vexations proceedings on appeal.

A proceeding is vexatious when a pleading, motion, argument, brief, document or record filed or any testimony presented is grossly lacking in the requirements of propriety. It is vexatious if any of them violate court rules, or grossly disregard the requirements of a fair presentation of the issues to the court. MCR 7.216(C)(1)(b). Sanctions on appeal are not merited merely because the appeal resulted from a frivolous claim or defense below; the appeal or appellate proceedings themselves must be vexatious. *Dewald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991).

Here, MCR 7.216(C)(1)(b) is inapplicable. Defendant does not allege that any proceedings in this Court were vexatious. Rather, she alleges that an appeal would have been unnecessary had plaintiff's trial counsel cleared up the trial court's mathematical error. MCR 7.216(C)(1)(b) does not cover such a situation.

We reverse and remand to the trial court for revision of the judgment in accordance with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Marilyn Kelly
/s/ Lido V. Bucci