STATE OF MICHIGAN

COURT OF APPEALS

STEWART L. GINGRICH,

Plaintiff-Appellant,

v

JOAN E. VANDERWERP, f/k/a JOAN E.GINGRICH,

Defendant-Appellee.

UNPUBLISHED

No. 185495
Macomb Circuit Court
LC No. 91-000610-DO

Before: Doctoroff, P.J., and Michael J. Kelly and Young, JJ.

MICHAEL J. KELLY, J. (dissenting).

I respectfully dissent. It is clear to me that the Qualified Domestic Relations Order ("QDRO") contradicts the stipulated settlement the parties agreed to on September 18, 1991, and the judgment of divorce entered on May 11, 1992.

At the settlement hearing on September 18, 1991, the following exchange took place regarding the distribution of plaintiff's retirement benefits from the United States Coast Guard:

> *Mr. Stepek [plaintiff's counsel]:* Your Honor, there are certain retirement benefits that the parties have by virtue of their employment.
>
> * * *
>
> Additionally, your Honor, relative to the plaintiff's pension which is with the U.S. Coast Guard, that pension, your Honor, shall be allocated between the parties pursuant to an order of assignment, 50 percent of the plaintiff's disposable monthly retirement, subject to the valuation date February 11, 1991, an order for distribution shall permit this defendant to receive one-half of that pension computed as of that time.
>
> *The Court:* Not all, just half?

Mr. Stepek: Half of the monthly benefits.

The Court: Half of the monthly pension that was assessed up to that time?

Mr. Stepek: As of that time.

The Court: If he has ten years left, I'm not saying the whole thing when he retires. . .

Mr. Stepek: Equal as of what it's computed as the value as of the date of February 11, 1991.

The Court: That is the retirement?

Mr. Stepek: That's correct your Honor.

Mr. Stepek: Now. . .

The Court: Do you understand that?

Mrs. Gingrich: Yes.

The judgment of divorce entered on May 11, 1992, contained the following provisions regarding plaintiff's retirement benefits:

> Plaintiff shall make effective service of process pursuant to the Uniformed Services Former Spouses' Protection Act, 10 USC 1408, to provide for direct monthly payments to defendant of 50% of his disposable retire pay, subject to its value on February 11, 1991[,] and to continue in the event defendant remarries, further, plaintiff certifies his rights under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC Appx 501 et seq., were observed and defendant shall have a survivor benefit option for which she shall bear the full cost; Plaintiff shall elect a Survivor Benefit Plan option per 10 USC 1448(b)(2), (4) and (5).

If the judgment had not run afoul of some functionary or format at the Coast Guard's personnel department, I presume that the intent of the parties would have been implemented without misadventure, i.e., when plaintiff retired from the Coast Guard, defendant would receive half of plaintiff's retirement pay computed to the date of the termination of the marriage, February 11, 1991. However, defendant's expert, Mr. Shilling, proposed an order that uses a pension calculation formula that runs contrary to the parties' original agreement and benefits defendant to plaintiff's detriment. The resulting QDRO revised the parties' original agreement and produced an unintended result. The trial court should not have condoned this. If the parties had explicitly agreed to the cost-of-living or inflationary increase, that certainly would have been acceptable, as the majority points out. However, both parties were well represented and came to an entirely appropriate settlement agreement that the trial court should not have allowed to be unilaterally modified. See *Zeer v Zeer*, 179 Mich App 622, 624; 446

NW2d 328 (1989) ("Property settlement provisions of a divorce judgment . . . are final and, as a general rule, cannot be modified."). Unfortunately, that is just what happened.

Plaintiff was a commander in the Coast Guard with twenty-two and one-half years of service at the time of the divorce. As Defendant was granted alimony for a total of three years and received a property settlement. evidenced by the limited alimony award, the parties may have anticipated that plaintiff would retire in three years. Any material change of circumstances could have been addressed by a motion to modify. Obviously the intent of the parties was to fix the pension amount to be received by defendant based upon the date certain of February 11, 1991. The QDRO effected a modification without the necessary change of circumstances.

I believe the trial court clearly erred and I would reverse.

/s/ Michael J. Kelly