

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

KATHRYN WALSH WHITE,

Plaintiff-Appellee,

v

TERRY L. WHITE,

Defendant-Appellant.

---

UNPUBLISHED  
December 7, 1999

No. 210146  
Oakland Circuit Court  
LC No. 95-502269 DM

Before: Kelly, P.J., and Jansen and White, JJ.

WHITE, J. (concurring).

I do not interpret the record as the majority interprets it. Specifically, I do not agree that defendant urged the court to adopt a valuation date subsequent to mediation. Defendant sought to have the court enforce what he believed had been agreed to at the mediation - - that the valuations introduced at the mediation would be used in the judgment of divorce. Further, I do not believe the court exercised its discretion in fixing the October 1996 date. I believe the court was simply suggesting a compromise.

Nevertheless, I concur with the majority's affirmance because I conclude that defendant waived his right to appeal by failing to express non-acceptance of the court's suggested compromise.

The disagreement regarding the valuation dates was apparently discussed in chambers sometime before the matter again arose on December 17, 1997 at a motion regarding holiday visitation. It appears that at the earlier conference plaintiff argued that the date should be the date of separation and the court expressed the opinion that it should be the date the complaint was filed. On December 17, defendant argued that at mediation it was agreed that the then current evaluations would be used. The court had been under the impression that the parties had not reached an agreement on the issue during mediation. Defendant asserted that that belief was incorrect and that the parties had, indeed, agreed. Defendant undertook to provide the court with affidavits. On 26, defendant filed an affidavit of the mediator, supporting his position.

When the parties returned to court January 21 to resolved their remaining disagreements, the matter was addressed as follows:

[*Defendant's Counsel*] Okay. Then the only remaining issue is the matter of the evaluation date for the pension. [Plaintiff's counsel] wishes that the evaluation date for the pension to be the date of separation; [defendant's counsel] would like the evaluation of the pension to be that as submitted at the time of mediation.

*The Court*: What is the difference in time?

[*Plaintiff's Counsel*]: A year, almost just under two years.

[*Defendant's Counsel*]: No, the difference would be - -

[*Plaintiff's Counsel*]: August the 11<sup>th</sup>, 1995, vis-à-vis March of 1997. It's just less than two years.

*The Court*: All right, we'll go back one year. *Okay?*

[*Plaintiff's Counsel*]: One year from when? October of '97?

*The Court*: Yes.

[*Plaintiff's Counsel*]: Go back to October of '96?

*The Court*: Yes.

[*Plaintiff's Counsel*]: That's a reasonable solution.

*The Court*: All set?

[*Guardian Ad Litem*]: Thank you, your honor.

*The Court*: Is that it?

[*Defendant's Counsel*]: Wait a minute. October of 1997?

[*Plaintiff's Counsel*]: '96; go back one year, to October of 96.

*The Court*: Fair enough?

[*Plaintiff's Counsel*]: Fair. Thank you, Judge.

*[Defendant's Counsel]*: I will edit this and send it back.

(Proceedings adjourned . . .)

Defendant, who is an attorney, was present at the hearing.

The Judgment of Divorce entered on February 12, 1998 bore the notation

APPROVED AS TO FORM AND SUBSTANCE,  
NOTICE OF ENTRY WAIVED:

and was signed by both parties and both attorneys. While such an approval and waiver will not operate to deprive a litigant of the right to appeal where the surrounding circumstances or subsequent events contradict the assumption that the order was in fact consented to, I conclude that this exception is not applicable in the instant case. Here, the asserted waiver is not based only on the notation on the judgment, but also on the failure to express dissatisfaction with the court's suggested compromise. While defendant did not expressly agree with the proposal, the court's inquiry and defense counsel's answer that she would modify the judgment could only be understood as acceptance of the suggestion. If defendant wanted to litigate the issue on the merits, he or his counsel should have answered the court's inquiry whether the proposal was "fair enough." Further defendant failed to object to the proposed judgment on this basis, and instead approved the judgment as to form and substance as well as waiving notice of hearing. Under these circumstances, I conclude that defendant has waived the right to object to the court's resolution of the issue.

/s/ Helene N. White