

STATE OF MICHIGAN
COURT OF APPEALS

MARIE MICHAJLYSZYN,
Plaintiff-Appellee,

UNPUBLISHED
June 2, 2005

v

WALTER MICHAJLYSZYN,
Defendant-Appellant.

No. 252681
Macomb Circuit Court
LC No. 02-004456-DO

Before: O’Connell, P.J., and Markey and Talbot, JJ.

Talbot, J. (*concurring in part and dissenting in part*).

I write separately because it does not appear that the parties ever contemplated a cost-of-living adjustment (COLA) prior to placing their property settlement on the record at the first hearing and, thus, never came to a meeting of the minds regarding how this asset would be distributed. I would therefore remand to the trial court for an evidentiary hearing to determine whether the parties came to an agreement on how the COLA should be distributed and to fashion an appropriate remedy in light of that finding. I concur with the majority opinion in all other respects.

A settlement agreement, such as a property settlement in a divorce, is construed as a contract, the interpretation of which is a question of law that is reviewed de novo. *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). Generally, when the court enters a consent judgment, it is final and binding, and can only be set aside on a proper ground for relief pursuant to MCR 2.612(C)(1). *Staple v Staple*, 241 Mich App 562, 564, 572; 616 NW2d 219 (2000). “Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties.” *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999), citing *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987). Nevertheless, “[t]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties.” *Mikonczyk v Detroit Newspapers*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999), quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). If there is no meeting of the minds on all material facts, there is no valid contract. *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992).

At the April 11, 2003, hearing, the trial court heard testimony from the mediator regarding the parties’ property settlement agreement. The mediator testified that the parties discussed dividing defendant’s Navy pension evenly between them by way of a qualified

domestic relations order (QDRO), but the mediator never mentioned the COLA. Plaintiff then submitted a proposed consent judgment of divorce that expressly provided for an equal division of the COLA. Defendant, however, objected to this language in his June 30, 2003, answer, insisting that plaintiff is only entitled to half of the pension payment as of April 11, 2003, and none of the COLA. Plaintiff changed the provision dealing with the distribution of the pension to read: “The Plaintiff is awarded fifty (50%) of the Defendant’s military retired pay. The percentage awarded to Plaintiff shall be computed as of the date of entry of this Judgment.” The trial court entered the judgment of divorce with this language in the property settlement and determined that the language grants plaintiff an equal share of the COLA.

The trial court’s reading of the property settlement is contrary to case law. This Court has previously held that “separate and distinct components of a pension plan must be specifically awarded in a judgment of divorce to be included in a QDRO.” *Quade, supra* at 224. Examples of separate and distinct components of a pension plan include rights of survivorship, *id.* at 225, and early retirement benefits, *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993). Similarly, the COLA is a separate and distinct component of the pension, and therefore, must be specifically included in the property settlement to be awarded.

The property settlement does not expressly include any mention of how the pension’s COLA is to be distributed. In fact, the second sentence of the provision dealing with the pension seems to cut against awarding plaintiff any of the COLA because the language “computed as of the date of entry of this Judgment” would become nugatory otherwise. However, there does not appear to be sufficient evidence on the record to determine whether the distribution of the COLA was ever negotiated between the parties. Plaintiff’s counsel stated to the trial court at a hearing on June 27, 2003, that “we gave up the COLA because that was mutually mistakenly omitted from the transcript.” Plaintiff also conceded at oral argument before this Court that the initial negotiations between the parties were for fifty percent of the pension, but the COLA was never discussed.

Because there is no evidence that the parties negotiated for the COLA, I cannot say that there was a meeting of the minds with regard to the distribution of this asset. I would, therefore, remand to the circuit court for an evidentiary hearing on the issue of whether the parties negotiated for the COLA. Based on its finding in the evidentiary hearing, the trial court could then fashion an appropriate remedy consistent with this opinion.

I would reverse and remand for an evidentiary hearing only with respect to the distribution of the COLA for defendant’s Navy pension. I would affirm in all other respects.

/s/ Michael J. Talbot