

STATE OF MICHIGAN
COURT OF APPEALS

VALENTINA NEUBAUER SYLVESTER,

Plaintiff/Counter Defendant-
Appellee,

UNPUBLISHED
April 15, 2014

v

No. 314040
Macomb Circuit Court
Family Division
LC No. 2011-001137-DO

ROBERT DONALD SYLVESTER,

Defendant/Counter Plaintiff-Appellant.

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals by leave granted an order granting plaintiff's motion for entry of a qualified domestic relations order ("QDRO") in this divorce action. Because the resulting QDRO does not give effect to the parties' divorce judgment, we reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

The parties were divorced on November 10, 2011, and a consent divorce judgment was entered. In the judgment, no spousal support was provided for either party. But with regard to property settlement, the judgment provided, in relevant part:

REAL PROPERTY

18055 Delaware Street, Roseville, MI 48066

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall be awarded the residence located at 18055 Delaware Street, Roseville, MI 48066 subject to Plaintiff's recordable security interest as more specifically set forth in the "Installment Payments" provision below. Defendant shall assume and pay any mortgage, taxes, insurance, utilities, or encumbrance on the above-described property, and will be solely and separately responsible for such payment.

* * *

INSTALLMENT PAYMENTS TO PLAINTIFF

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall pay to Plaintiff directly the sum Twenty-Eight Thousand Eight Hundred and 00/100 Dollars (\$28,800.00) in installment payments as a property settlement to Plaintiff as follows:

Six Hundred and 00/100 Dollars (\$600.00) per month (received by the Plaintiff by the 10th of every month) for a period of 48 months. The effective date of said installment payments shall be upon entry of the Consent Judgment of Divorce.

These payments shall be secured by a recordable security interest on the property located at 18055 Delaware Street, Roseville, MI 48066.

The consent judgment further provided, with respect to defendant's defined benefit plan:

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff (a/k/a Alternate Payee) shall be entitled to fifty (50%) percent of Defendant's (a/k/a Participant) defined benefit plan listed below:

Chrysler Group, LLC Pension Plan (in pay status)

IT IS FURTHER ORDERED AND ADJUDGED that while payments to the Participant have begun, the Alternate Payee shall be entitled to begin receiving benefits on the date of Alternate Payee's (non-disability) retirement age, to wit, 62 years of age. However, Alternate Payee may elect to receive the Alternate Payee benefits prior to her 62nd birthday in the event Alternate Payee is unable to work due to disability or incapacitation.

The consent judgment further directed that Sky Professional Solutions prepare a QDRO to submit to the plan administrator, Benefit Express. The first QDRO that Sky Professional Solutions prepared provided:

10. COMMENCEMENT:

The Alternate Payee's assigned share shall commence on or after September 20, 2020. However, in the event the Alternate Payee is unable to work due to her disability or incapacitation, the Alternate Payee may elect to commence her assigned benefit earlier beginning on the date the Alternate Payee applies for her benefit in the manner prescribed by the administrator.

Benefit Express, however, denied the proposed order because it determined that a delayed benefit commencement date is not permissible under current QDRO procedures.

Thereafter, Sky Professional Solutions prepared a second QDRO that provided:

10. COMMENCEMENT:

The benefits payable to the Alternate Payee will commence as soon as administratively feasible following qualification of this Order.

Plaintiff filed a motion for entry of the second QDRO. Defendant opposed entry of the QDRO on the basis that it did not conform to the parties' agreement as stated in the consent judgment because plaintiff was only 54 years old at the time. The trial court granted plaintiff's motion.

II. ANALYSIS

Defendant contends that the trial court erred by granting plaintiff's motion for entry of the QDRO because the modified QDRO affected the substantial rights of defendant, did not reflect the intent of the parties, and did not conform to the consent judgment of divorce. We agree.

A trial court's decision interpreting a divorce judgment and a QDRO is reviewed de novo by this Court. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012). Moreover,

[t]o the extent that the judgment and the QDRO were entered pursuant to the parties' agreement, questions involving the interpretation of the agreement, including whether any language is ambiguous, are also reviewed de novo because judgment entered pursuant to the agreement of parties are in the nature of a contract. [*Id.*]

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy." *Id.* Generally, "consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage." *Id.* A mutual mistake occurs "where the parties have a common intention, but the resulting judgment rests on a common error." *Biondo v Biondo*, 291 Mich App 720, 728; 809 NW2d 397 (2011) (quotation marks and citation omitted).

Here, the parties agree that the QDRO entered by the trial court differs from what the consent judgment required. But plaintiff contends that the trial court properly entered this modified QDRO on the basis of the existence of a mutual mistake. Specifically, plaintiff claims on appeal that the parties mistakenly thought that plaintiff could not collect under the plan at the time of the consent judgment. In essence, plaintiff is arguing that the parties would have agreed to allow plaintiff to start receiving 50 percent of the Chrysler pension immediately if they had realized that it was permissible. However, there is nothing in the record to support this view. In fact, plaintiff's counsel at the hearing stated that this delayed payment was specifically sought because "[t]here was an income disparity [between the parties] and [receiving pension payments immediately] could have put [plaintiff] in a position where her income could put her at a level superior to [defendant]," which could have affected spousal support considerations.

Thus, while there is no evidence to show that the parties made their agreement based on an erroneous belief that plaintiff was ineligible to receive payments immediately, the parties

nonetheless were mistaken regarding what Benefit Express would allow in a QDRO. However, this type of mistake is insufficient to reform the agreement.

In *Biondo*, this Court allowed the circuit court to modify the divorce judgment's property-settlement provision because the parties mistakenly believed that their social security benefits were marital property that would be equally divided amongst themselves. However, this Court determined that such an agreement was prohibited by federal law¹ and that this particular provision of the consent judgment was a mutual mistake. *Biondo*, 291 Mich App at 728-729. Accordingly, the parties were not free to "equalize their social security benefits," as the consent judgment required. *Id.* at 722, 731.

While *Biondo* dealt with a federal prohibition of the fundamental nature of the underlying agreement, the same is not true in the present case. Here, the parties do not cite any federal law that call into question the *essence* of the provision in the consent judgment dealing with the Chrysler pension. The only issue is with the *execution* of the agreement. In other words, it is apparent that entering the initial QDRO *now*, which would have provided for plaintiff to start receiving payments in the *future*, is not allowed. However, this aspect is not the same as a prohibition of the agreement itself.

According to the plain terms of the consent judgment, defendant was to receive his full pension up until plaintiff reached 62 years of age.² Additionally, as part of the property distribution, defendant was to pay plaintiff \$600 per month for the first four years following the entry of the consent judgment. Because plaintiff was only 53 years old at the time of the entry of the consent judgment, the \$600 monthly payments would have ended when she was 57 years old. Then, once plaintiff reached 62 years of age, defendant would no longer receive a full pension payment because he and plaintiff would each start receiving 50 percent.

With the trial court entering the modified QDRO, it is evident that the intent of the consent judgment is not being effectuated. Plaintiff started receiving her 50 percent pension payments eight years earlier than anticipated, and defendant still was obligated to make the \$600

¹ This Court noted that § 407(a) of the Social Security Act provided that "[t]he right of any person to any future payment under this subsection shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." *Biondo*, 291 Mich App at 724, quoting 42 USC 407(a).

² Plaintiff argues on appeal that the consent agreement contemplated defendant only receiving 50 percent of his pension payments following the divorce, with the other half presumably being retained by Chrysler. However, the plain language of the judgment acknowledges that defendant was already receiving his pension payments, and there was nothing to suggest that he should now start receiving partial or half payments before plaintiff reached 62 years of age.

monthly payments.³ The crux of the trial court's error is that it failed to make any attempt to tailor a solution that reflected the clear intent of the consent judgment. Sky Professional Solutions even provided four alternate solutions to the problem, one of which was simply delaying submission of the QDRO until plaintiff reached the age of 62. Defendant also offered another solution, where the trial court could enter a "supplemental order" in conjunction with the entered QDRO, which would require plaintiff to pay back to defendant the amounts she received under the pension payments, while maintaining defendant's obligation to pay the \$600 per month for 48 months.

We note that defendant's proposal is akin to what the parties agreed would happen when one party received a benefit the other was entitled to receive. In the consent judgment, there is a section entitled "constructive trust," which provides as follows:

CONSTRUCTIVE TRUST

IT IS FURTHER ORDERED AND ADJUDGED that, if due to omission or commission by either party, or the death or disability of either party prior to implementation and satisfaction of the entire terms of this Consent Judgment of Divorce, the other party does not receive an asset or other benefit that he or she was intended to receive under the terms of this Consent Judgment of Divorce, the person or entity that receives or holds that asset or benefit shall do so in a constructive trust for the benefit of the party who was the intended recipient of that asset or benefit under this Consent Judgment of Divorce. The parties intend that this clause be binding on their estates, heirs and assigns.

Because of the ultimate entry of the QDRO, plaintiff is receiving half of defendant's monthly pension benefit when that money should have been going to defendant until plaintiff reached age 62. Thus, plaintiff is receiving a benefit that defendant was entitled to. In accordance with the above provision, the trial court could have ordered that plaintiff hold the pension benefit in a constructive trust for defendant's benefit. Such a ruling would have given effect to the contractual language, which was binding on the trial court and the parties, *Laffin*, 280 Mich App at 517, and was not otherwise barred by law, cf. *Biondo*, 291 Mich App at 728-729.

Lastly, defendant argues that this Court should remand this matter to a different judge. This Court may remand "to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). Defendant's argument rests on what he contends is the trial court's inability to recognize the "inequity of his decision, the impropriety of ordering an alteration of a consent judgment, or the hardship" caused to defendant. This Court has held that defendant "must demonstrate that the judge would be unable

³ The record does not establish how many of these \$600 payments defendant has made, but his counsel suggested at the motion hearing that with only receiving half of his pension payments, he cannot afford to also make the \$600 payments.

to rule fairly on remand given his past comments or expressed views.” *Id.* at 603. However, based on a review of the entire record, there is no indication that the trial judge would be unable to put his previous rulings aside, and the trial court did not make any specific comments expressing a particular bias. Thus, plaintiff has failed to meet the high standard required to remand this matter to a different judge.

We reverse the trial court’s order entering the QDRO and remand for it to tailor a solution that will give effect to the plain intent of the consent judgment. On remand, if the trial court concludes that the present QDRO should remain in effect, it then has to formulate other orders to ensure that one party is not obtaining benefits he or she is not entitled to. Such tools at the court’s disposal may include, but are not limited to, an accounting and the use of a constructive trust as dictated in the consent judgment.

We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen