STATE OF MICHIGAN

COURT OF APPEALS

DONNA RE TAACK, f/k/a DONNA RE RAINES, Plaintiff-Appellee, v RONALD DEAN RAINES, Defendant-Appellant.	UNPUBLISHED August 24, 2004 No. 247193 Shiawassee Circuit Court LC No. 93-002342-DM

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

This case is before us on remand[1] from the Supreme Court for consideration of the following issues on appeal:

> [W]hether the Qualified Domestic Relations Order is proper in light of *Quade v Quade*, 238 Mich App 222 (1999), and whether defendant should receive credit for overpayment of child support. . . . [T]he Court of Appeals shall consider whether defense counsel's statements to the trial court regarding the Qualified Domestic Relations Order waived any objection to that order. [*Taack v Raines,* 468 Mich 863; 659 NW2d 229 (2003).]

We reverse in part and remand in part for further proceedings consistent with this opinion.

Defendant first argues that the trial court erred in upholding a qualified domestic relations order (QDRO) that did not conform to the judgment of divorce. Specifically, the QDRO awarded plaintiff survivorship rights and a portion of defendant's early retirement subsidy that were not specified in the judgment of divorce.

[1] This Court initially denied defendant's claim of appeal for lack of merit in the grounds presented. *Taack v Raines*, unpublished order of the Court of Appeals, entered April 25, 2002 (Docket No. 239503).

As with any other form of judgment, consent judgments are considered final and binding. *Staple v Staple*, 241 Mich App 562, 564-565; 616 NW2d 219 (2000); *Keyser v Keyser*, 182 Mich App 268, 269; 451 NW2d 587 (1990). Property settlement provisions, reached by the parties' consent, are deemed final and cannot be modified by the court. *Quade v Quade,* 238 Mich App 222, 226; 604 NW2d 778 (1999); *Klawiter v Reurink*, 196 Mich App 263, 266; 492 NW2d 801 (1992). The parties in this matter evidenced their agreement to enter into a consent judgment of divorce and placed the terms of their agreement on the record. The language of the judgment of divorce conforms to the agreement of the parties. The oral settlement agreement of the parties, along with the actual language of the judgment of divorce, are silent on the issues of plaintiff's survivorship rights and the distribution of early retirement benefits with regard to defendant's pension.

This Court has consistently ruled that:

> [S]eparate and distinct components of pension plans must be specifically awarded in a judgment of divorce in order to be included in a QDRO. In *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993), this Court held that the right of survivorship in a pension plan will not be extended to a divorced spouse unless it is specifically included as part of the pension award in the judgment of divorce. Similarly, early retirement benefits are a separate and distinct component of defendant's pension plan that were not specifically included in plaintiff's property settlement in the judgment of divorce. [*Quade, supra* at 224-225.]

As such, "[a]bsent a specific provision in the judgment of divorce, we cannot conclude that the parties intended to include early retirement benefits as part of plaintiff's property settlement." *Quade, supra* at 225. The trial court concluded the opposite, i.e., it held that the absence of any reference to early retirement benefits and survivorship rights mandates their inclusion in the judgment and QDRO. As such, the trial court's holding is contrary to consistent rulings of this Court, which mandate that separate components of pensions, including but not limited to survivorship rights and early retirement benefits, must be specifically included to be deemed a part of the property agreement of the parties.

We disagree with plaintiff's assertion that any objections to inconsistencies existing between the judgment of divorce and QDRO were specifically waived by defendant's counsel. By agreeing to the QDRO, plaintiff contends that defendant's counsel waived objection to any discrepancies between the QDRO and divorce judgment and effectively stipulated to modifications in the terms of the judgment of divorce by accepting the language of the QDRO.

The statements of defendant's counsel at the hearing on August 25, 1995, did not constitute a clear waiver of his client's rights. Although a client is bound by the actions of his attorney that occurred within the scope of his authority, *AMCO Builders & Developers, Inc v Team Ace Joint Venture,* 469 Mich 90, 104; 666 NW2d 623 (2003), for several reasons the statements at the hearing did not waive any objection to the erroneous QDRO. First, the proposed QDRO (prepared by plaintiff's counsel) was signed and entered without defendant having the opportunity to submit written objections, as the court signed it without affording any such opportunity. Second, the transcript cited by plaintiff was from a hearing held after the order had already been entered, thus any statements at that hearing could not be viewed as a waiver of objections to an order that had already been entered. Third, we believe that the statements made

at the hearing were only to the effect that defendant's counsel had agreed to the QDRO as a necessary vehicle for the retirement benefits, not necessarily to the terms of the actual order. We hold that there was no waiver of objections to the erroneous QDRO. *HJ Tucker & Assoc v Allied Chucker & Eng Co,* 234 Mich App 550, 564; 595 NW2d 176 (1999).[2]

The third and final issue our Supreme Court directed us to consider is the failure of the trial court to award defendant reimbursement for overpayments of child support. Due to the failure to enter an order for modification of child support, the Friend of the Court could not calculate the alleged overpayment, but the trial court indicated that it would make the correction. Unfortunately, the trial court record and subsequent order are silent on the issue so it is impossible to determine if the court found reimbursement to be appropriate and in what amount.

Plaintiff argues that given defendant's failure to submit an order reflecting the parties' agreement for modification of child support, any overpayment should be deemed voluntary, and thus, not compensable. *Pellar v Pellar*, 178 Mich App 29, 35; 443 NW2d 427 (1989). Unlike *Pellar*, defendant in this matter is not seeking a credit for overpayment against a future child support obligation or prepayment, which is disallowed. This issue is merely one of reimbursement for overpayment. As the trial court indicated, the parties agreed verbally and through their behavior modified child support, even if a formal order was not submitted. As such, it would appear appropriate and equitable to effectuate their agreement and determine if defendant is owed reimbursement. Contrary to defendant's position, any amounts modified would be retroactive only to the date of the filing of defendant's motion for change of custody and support. MCL 552.603(2); *Waple v Waple*, 179 Mich App 673, 675; 446 NW2d 536 (1989). Further, any reimbursement should include deductions for defendant's failure to pay the modified child support of $24 per week until the child in plaintiff's custody graduated from high school, in addition to deductions for any outstanding arrearages, late, or statutory fees owed. As such, this matter should be remanded to the trial court for a written order effectuating its oral ruling of August 22, 2001.

Defendant also asks us to consider his arguments pertaining to personal property distribution. However, as defendant recognizes, since we denied his application for leave to appeal and the Supreme Court did not include that property issue as something for us to consider on remand, it is in our discretion whether to hear that issue. We decline to do so.

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[2] Plaintiff has abandoned any issue relating to the timeliness of defendant's challenge to the QDRO, as plaintiff has failed to argue or cite any authority to this Court that defendant's challenge was untimely. *Korth v Korth,* 256 Mich App 286, 294; 662 NW2d 111 (2003). Additionally, from our review of the lower court record, it appears plaintiff also failed to raise any timeliness issue under MCR 2.612 to the trial court.

We reverse the trial court's ruling regarding the modification of the QDRO. We remand the issue of reimbursement for child support overpayment to the trial court for action consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell