

STATE OF MICHIGAN
COURT OF APPEALS

JAMES RAYMOND HESTER,

Plaintiff-Appellee,

v

LISA LOU HESTER,

Defendant-Appellant.

UNPUBLISHED

January 28, 2021

No. 351483

St Joseph Circuit Court

LC No. 17-000587-DO

Before: SHAPIRO, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant, Lisa Lou Hester, appeals by right from the final judgment of divorce (JOD) dissolving her marriage with plaintiff, James Raymond Hester. Defendant contends that the trial court erred by entering plaintiff's proposed JOD because it did not accurately reflect the parties' settlement agreement to split defendant's United States Postal Service (USPS) Disability Pension evenly, but to award defendant her regular USPS deferred pension in exchange for her assumption of the marital debt. Defendant also contends that the JOD erroneously included a fixed monthly dollar amount to be paid to plaintiff from defendant's pension when the parties had agreed to an equal division, not a fixed dollar amount. Finding no error requiring reversal, we affirm.

I. RELEVANT FACTS AND PROCEEDINGS

The facts underlying this appeal are not directly relevant to the issues on appeal, which pertain to whether the JOD entered by the trial court accurately reflects the settlement agreement the parties placed on the record on July 25, 2019. Nevertheless, some background is helpful to provide context for the parties' positions.

The parties separated in May 2017, after 33 years of marriage, and plaintiff filed a complaint for divorce on July 25, 2017. At the time, plaintiff was approximately 56 years old, and defendant was approximately 55. Plaintiff had worked throughout the marriage, primarily at jobs that paid minimum wage. He suffered a heart attack in 2002 that eventually required quadruple bypass surgery. He was subsequently placed on social security disability, but appears to have worked part-time thereafter. Defendant obtained employment with the United States Post Office (USPS), where she worked for 25 years before retiring in 2009 due to a disability caused by a

shoulder injury. Defendant went back to school and obtained her associate's degree in accounting, and began working for a company doing business as Jackson Hewitt Tax Services on December 31, 2012. The divorce was bitterly contested. Among other things, the parties accused one another of violating a mutual personal protection order, of damaging marital property, and of marital infidelity. In addition, plaintiff accused defendant of disposing of marital assets in violation of the trial court's order to preserve the assets, and of not handing over items of personal property, such as his clothing.

At a bench trial in October 2017, defendant testified relative to the issue at hand that she took loans out on her retirement throughout her career at the USPS and that the only thing she had left was her disability pension. Defendant testified that she grossed approximately \$1,800 a month in disability retirement, and answered affirmatively when asked if she would receive her disability pension "all the way up to the time of death." In post-trial filings, defendant insisted that she was entitled to all of her disability pension, while plaintiff maintained that the pension was a marital asset that the court should view as income for purposes of computing spousal support or, barring that, that the court should allow plaintiff to petition for a portion of the pension. Neither party referred to any USPS pension other than defendant's disability pension.

Before the trial court could issue its opinion and order, defendant filed for Chapter 13 bankruptcy, thus triggering an automatic stay that paused the divorce case for approximately one year. On July 25, 2019, after the stay had been completely lifted, the parties reached a settlement regarding their outstanding property issues and put their settlement on record. As to the pension at issue, plaintiff's attorney expressed the parties' agreement as follows:

[Defendant] receives what we've been referring to as a pension through the United States Postal Service. It was connected with a disability that she had. And the parties have agreed that this asset is going to be equally divided, commencing December 31st of 2019; that any and all survivor benefits or collateral benefits associated with the pension would be also awarded to [plaintiff].

At the end of the hearing, the court instructed plaintiff's attorney to prepare the JOD and defendant's attorney to prepare the order necessary to divide the pension.

Plaintiff's attorney submitted a proposed JOD under the 7-day rule. A section entitled "Pension, Annuity and Retirement Benefits" provided in relevant part:

That the Plaintiff/husband shall receive the following as set forth below which shall be included in and by way of an appropriate Qualified Domestic Relations Order (QDRO), Qualified Court Order (QCO), or Qualified Court Order Acceptable for Processing (COAP), as applicable, a one-half, or 50% interest in the Defendant/wife's gross United States Postal Service Plan, "Plan", (Pension and/or Annuity) Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS), which shall not be limited to the employee contributions of the Defendant/wife, if any, but rather shall be based upon and include the entire gross amount of the Defendant/wife's benefit accumulated during the course of the parties marriage and through the date of the entrance of the Judgment of Divorce. The QCO or applicable Order shall bar any refund of the

Defendant/wife receiving a refund of any employee contribution which she may have made with respect to said Plan as stated herein and above.

In furtherance, that in accord with the above, and as a result of the Defendant/wife being eligible for retirement benefits under the Civil Service Retirement System (CSRS) or Federal Employee Retirement System (FERS) based on employment with the United States Government, the Plaintiff/husband is entitled to \$967.00 per month from the Defendant/wife's retirement benefits commencing December 31st, 2019. The United States Office of Personnel Management is directed to pay the Plaintiff/husband's share directly to the Plaintiff/husband. A qualifying Court Order shall be entered and submitted to effectuate this payment and the terms set forth herein. The Defendant/wife shall be responsible for the cost and preparation of the applicable Qualified Order (QDRO, QCO, or COAP), which shall be completed within a timely manner.

Pursuant to the first paragraph above, plaintiff was to receive 50% of the gross amount of defendant's USPS pension. The second paragraph effectuated the first paragraph by further identifying plaintiff's share as \$967 month, half of the gross pension amount defendant was currently receiving.

Defendant filed written objections to the proposed JOD, stating in relevant part that the proposed JOD "contains certain inaccurate representations related to . . . division of a marital pension." Defendant did not further specify the alleged inaccuracies, but attached to the objections her own proposed JOD, which she asserted "accurately represents the settlement." The section pertinent to division of the pension provides in relevant part:

[T]he Plaintiff/husband shall receive the following as set forth below which shall be included in and by way of an appropriate Qualified Domestic Relations Order (QDRO), Qualified Court Order (QCO), or Qualified Court Order Acceptable for Processing (COAP), as applicable, a one-half, or 50% interest in the Defendant/wife's gross United States Postal Service Plan, "Plan", (Pension and/or Annuity) Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS), identified as Exhibit B, which Defendant/wife is currently receiving for disability, effective January 1, 2020.

The United States Office of Personnel Management is directed to pay the Plaintiff/husband's share directly to the Plaintiff/husband. A qualifying Court Order shall be entered and submitted to effectuate this payment and the terms set forth herein. . . .

Notably, the paragraph first-quoted above makes explicit that the pension that will be divided equally between the parties is defendant's current disability pension. Exhibit B is an annuity statement from the Office of Personnel Management, Retirement Programs showing the gross monthly amount of defendant's pension (\$1,934), the amounts taken out for various deductions, and the resulting net payment amount (\$1,315.89). The second paragraph of defendant's proposed JOD omits any reference to a fixed dollar amount.

The trial court heard argument on defendant's objections on October 4, 2019. The court observed that the parties "came in today" and listened to the audio recording of the July 25, 2019 proceeding at which they had placed their settlement on the record. The court then indicated that it was satisfied that plaintiff's proposed JOD "is the accurate one as to what was put on the record." Defendant's attorney did not raise any objections, and asked only whose version of the JOD the trial court had signed. The hearing took four minutes.

Subsequently, defendant filed a motion pro se for reconsideration, alleging that the trial court committed palpable error by entering a JOD that did not comport with the parties' July 25, 2019 agreement. Defendant argued that the parties had agreed to divide her current disability pension, as evidenced by the \$967 amount stated in the JOD, but not the deferred pension she would begin to receive at age 62. She alleged that the parties had agreed she could keep all of her deferred pension as compensation for having assumed the marital debt in bankruptcy. In support of her position that she was entitled to more than one type of pension, defendant attached a printout from the United States Office of Personnel Management (OPM) explaining the different types of retirements available under the Federal Employees Retirement System (FERS) and how the various payouts are calculated. The court denied defendant's motion for reconsideration, concluding that it failed to establish a palpable error by which the court and the parties had been misled and to show that a different disposition must result. This appeal followed.

II. DISCUSSION

Defendant contends that the parties had agreed to split her disability pension only, and that she would keep all of her deferred pension in exchange for her assumption of the marital debt. She first argues that the trial court erred by entering plaintiff's proposed version of the JOD because it does not reflect this agreement. She also argues that signing plaintiff's proposed JOD was error because it awards plaintiff a fixed dollar amount, rather than an "equal division" of her disability pension as they agreed upon, given annual adjustments that can occur in the dollar amount.

A. STANDARD OF REVIEW

This Court generally reviews de novo a trial court's interpretation of a divorce judgment. *Hudson v Hudson*, 314 Mich App 28, 33; 885 NW2d 652 (2016). "A settlement reached to end litigation . . . placed on the record and embodied in a judgment of divorce, becomes a contract between the parties." *In re Lett Estate*, 314 Mich App 587, 599; 887 NW2d 807(2016). "The same legal principles that generally govern the construction and interpretation of contracts also govern a settlement agreement in a judgment of divorce." *Id.* at 599-600. "The interpretation of a contract is a question of law reviewed de novo on appeal." *Lueck v Lueck*, 328 Mich App 399, 404; 937 NW2d 729 (2019) (cleaned up).

B. PENSION

The assumption underlying defendant's argument is that she is entitled to two different pensions, and that when she reaches 62 years of age, her disability pension will stop and a deferred pension will begin. Defendant supported this assumption in the trial court by attaching to her

motion for reconsideration a printout from the website of the OPM that explains the types of retirement available under the (FERS).¹ Defendant's argument is unavailing.

According to the information provided by defendant, the FERS offers federal employees four types of retirement: disability retirement; early retirement; voluntary retirement; and deferred retirement. Relevant to the instant case are the disability retirement program and the deferred retirement program. It is undisputed that defendant took disability retirement in 2009, and that she was under the age of 60 at the time of her divorce. If a person receiving a disability benefit (i.e., pension/annuity) is under 60 years of age, the disability benefit will terminate if that person medically recovers from the disabling condition or "administratively" recovers from the condition, i.e., returns to federal service in a position equivalent to what the person held at retirement. The disability benefit will also terminate during any calendar year when the person receiving the pension earns at least 80% of the current rate of pay for the position from which he or she retired. The disability benefit may be reinstated if the disability recurs or if the 80% earnings limitation is not exceeded. Computation of the disability retirement annuity is based on the annuitant's age and years of service. The annuity is recomputed after the first twelve months, and again when the annuitant reaches age 62, if the annuitant is under age 62 at the time of disability retirement. When the annuitant reaches age 62, his or her disability retirement will be recomputed "using an amount that essentially represents the annuity [she] would have received if [she] had continued working until the day before [her] 62nd birthday and then retired under FERS."²

Eligibility for the deferred retirement program is also based on age and service requirements. Once age and service requirements have been met, the deferred annuity is calculated based on the annuitant's length of service and "high-3" average salary, i.e., the average of the annuitant's highest basic pay over any 3 consecutive years of creditable service. For those who retire with less than 20 years of service, the formula for computation of the deferred benefit is 1 percent of the high-3 average salary for each year of service. For the person who retires at age 62 or older and with 20 or more years of service, the deferred benefit is 1.1 percent of the high-3 average salary for each year of service.³

The OPM's explanation of retirement types and associated benefits provides no factual support for defendant's assertion that age is a factor in the cessation of disability retirement annuities and that her disability pension will simply cease when she reaches age 62. As previously indicated, a disability pension ceases when the annuitant is medically or administratively recovered from the disabling condition, or when his or her annual income exceeds certain limits. However, defendant's argument is not predicated on the effect of one of these terminating events, but on cessation of the pension when she reaches age 62. In addition, defendant's affirmation during the bench trial that she would receive the disability pension for the rest of her life makes clear that she did not anticipate the termination of her disability pension under any of the circumstances

¹ See "Retirement Services, FERS Information." <https://www.opm.gov/retirement-services/fers-information/types-of-retirement/#url=Overview> (accessed January 2, 2021).

² *Id.*, at the "Disability" tab.

³ *Id.* at the "Deferred" tab. There are special provisions for certain categories of employees, but these are not relevant here.

identified by the OPM. Thus, not only is there no basis in the OPM's explanatory material for defendant's assertion that reaching age 62 will cause her disability pension to end, but defendant indicated at trial that she did not anticipate an end to her disability pension.

Barring the occurrence of one of the aforementioned terminating events, when defendant reaches age 62, her pension will be recomputed "using an amount that essentially represents the annuity [she] would have received if [she] had continued working until the day before [her] 62nd birthday and then retired under FERS." Nothing in the evidence provide by defendant indicates that this re-computation converts one type of pension into another type of pension, a disability pension into a deferred pension. It appears that the type of USPS pension defendant receives after she reaches age 62 will be the same as when the trial court entered the JOD, just recomputed in accordance with FERS guidelines. Considering that defendant receives—and will continue to receive—one USPS pension, recomputed after she reaches age 62, there is no meaningful difference between plaintiff's proposed JOD, which identified defendant's pension simply as a USPS pension, and the JOD proposed by defendant, which specified that defendant's USPS pension as a disability pension. Accordingly, the trial court did not err by entering plaintiff's proposed JOD.

Even if we assumed for the sake of argument that defendant would be entitled to a different pension, i.e., a deferred pension, and that she agreed to assume responsibility for substantial marital debt in exchange for keeping all of this deferred pension, no such agreement was placed on the record and cannot now be raised. See *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352, 360 (2014) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.") (quotation marks and citation omitted).

Plaintiff's attorney placed the parties' settlement on the record, including the parties' agreement that all claims not placed on the record were mutually barred. Given the opportunity to comment, defendant's attorney clarified a couple of unrelated matters, but made no mention of any alleged bargain defendant had struck as compensation for having assumed the marital debt in bankruptcy. In addition, in a colloquy between defendant and her attorney, defendant affirmed that she understood the settlement and that, in making it, she was giving up her right to an evidentiary hearing on the matters resolved by the settlement, and that she agreed to the settlement voluntarily and would willingly be bound by it. In light of the parties' agreement that any claims not placed on the record were barred, and defendant's express statement that she understood the terms of the agreement and voluntarily agreed to be bound by them, defendant cannot now claim that the trial court erred by not incorporating into the JOD an alleged trade-off that was not mentioned anywhere in the parties' settlement or in the competing proposed JODs. If there is error, it is error harbored by defendant and from which she cannot now be allowed to benefit. See *Hoffenblum*, 308 Mich App at 117.

For the foregoing reasons, we conclude that the trial court did not err in determining that the JOD entered accurately reflected the parties' agreement regarding division of defendant's USPS pension.

C. FIXED-DOLLAR AWARD

Defendant next contends that the trial court erred by entering plaintiff's proposed JOD because it erroneously awarded a fixed dollar amount to plaintiff instead of the parties agreed-upon percentage. Plaintiff agrees that the JOD contains a paragraph erroneously awarding plaintiff a fixed dollar amount, but argues that the error is harmless because the Court Order Acceptable for Processing (COAP) governs OPM's division and distribution of the pension, and the COAP accurately reflects the agreement. We agree with the parties that the language awarding plaintiff a fixed dollar amount does not reflect the agreement the parties placed on the record. Nevertheless, for the reasons stated below, we agree with plaintiff that the error is harmless. Harmless error is "[a] trial-court error that does not affect a party's substantive rights or the case's outcome." *Black's Law Dictionary* (11th ed. 2019).

As an initial matter, any error arising from the trial court's signing the JOD that included language awarding a fixed dollar amount of defendant's pension to plaintiff was at least as attributable to the parties as to the trial court. The only proper objections to a JOD are to its accuracy or completeness, and objections must state with specificity the inaccuracy or omission. MCR 2.602(B)(3)(b). Defendant's objections to plaintiff's proposed JOD were general; she noted only that the proposed JOD contained "certain inaccurate representations related to the disposition of certain personal property and division of a marital pension[.]" without further specifying the nature of those inaccuracies. Although defendant submitted a proposed JOD that she claimed accurately reflected the parties' agreement, she left it to the trial court to comb through the competing JODs in search of differences, and then to determine which version more accurately reflected the parties' agreement and why, all without any explanation or argumentation from her.

Moreover, defendant's proposed JOD arguably supports the notion that 50% of defendant's pension at the time of entry of the JOD was \$967. The section in defendant's proposed JOD relevant to division of defendant's pension states that plaintiff shall receive a 50% interest in defendant's gross USPS Plan "identified as Exhibit B, which Defendant wife is currently receiving for disability" Exhibit B is an annuity statement dated December 1, 2018, and shows a gross annuity of \$1,934, half of which is \$967. The purpose of Exhibit B appears to have been to establish that the pension defendant received was for disability, not necessarily to establish the fixed amount to which plaintiff was entitled. Nevertheless, given that defendant did not explain to the court in writing or at the hearing on her objections that the parties agreed to a percentage split and not to a fixed dollar amount, and considering that Exhibit B confirmed that 50% of defendant's current pension was \$967, as set forth in plaintiff's proposed JOD, the trial court can hardly be faulted for signing plaintiff's proposed JOD.

Turning to the trial court's erroneous inclusion in the JOD of the provision awarding a fixed dollar amount to plaintiff, we deem this error harmless for two reasons: (1) the COAP governs division of the pension and it accurately embodies the parties' settlement, and (2) it is clear from the language of the JOD that the paragraph containing the \$967 award is subordinate to the operative paragraph awarding plaintiff a 50% interest in defendant's gross USPS pension.

Plaintiff correctly states that the COAP reflects the parties' agreement and governs division of defendant's pension. Court orders affecting retirement benefits are governed by 5 CFR 838. Plaintiff must apply in writing to the OPM to be eligible for the court-awarded portion of

defendant's pension and must submit a copy of the COAP with his application. § 838.221(a)-(b)(1). The OPM must comply with the terms of a properly filed COAP, and will not honor either party's request to pay an amount different than that called for by the COAP, even if the parties should agree on the different payout. § 838.135. If defendant wishes to challenge the validity of the COAP, or either party wishes to challenge the payment provisions of the COAP, the party must do so in the state court and submit the resulting state-court orders to the OPM. § 838.222(a)(1)(iv) and(a)(2)(vi). In other words, the OPM's role in processing and complying with the COAP is purely ministerial. § 838.101(2). Defendant does not dispute that the COAP governs division of her pension, and that the COAP correctly embodies the parties' agreement.

Second, it is clear from the language of the JOD that the paragraph containing the \$967 award is subordinate to, and an attempt to effectuate, the award to plaintiff of a 50% interest in defendant's gross USPS pension. The JOD accurately reflects the parties' agreement when it states: "Plaintiff/husband shall receive . . . a one-half, or 50% interest in the Defendant/wife's gross United States Postal Service Plan, "Plan", (Pension and/or Annuity) Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS)" However, in the immediately following paragraph the JOD adds that, "in accord with the above" award, "the Plaintiff/husband is entitled to \$967.00 per month from the Defendant/wife's retirement benefits commencing December 31st, 2019" Interpreting these two paragraphs together leads us to the conclusion that, if at some point after December 31st, 2019, 50% of defendant's gross USPS pension is not \$967, it is the percentage that governs the split, not the dollar amount. This interpretation is strengthened when one considers the COAP, which neither party has challenged. In sum, the JOD contains the party's agreement that plaintiff is entitled to a 50% share of defendant's USPS pension, the governing COAP reflects this agreement, and the language of the JOD makes clear that the award of \$967 is an attempt to effectuate the 50% split that governs division of the pension. For these reasons, inclusion of the provision identifying a fixed dollar amount as effectuating the 50% split does not affect defendant's substantive rights or the outcome of the case and, therefore, is harmless error. *Black's Law Dictionary* (11th ed. 2019).

Affirmed.

/s/ Douglas B. Shapiro
/s/ David H. Sawyer
/s/ Jane M. Beckering