

STATE OF MICHIGAN
COURT OF APPEALS

DORIS MARIE THORNTON,
Plaintiff-Appellant,

UNPUBLISHED
October 23, 2007
APPROVED FOR
PUBLICATION
January 3, 2008
9:00 a.m.

v

JOHNNIE R. THORNTON,
Defendant-Appellee.

No. 270931
Genesee Circuit Court
LC No. 92-171931-DO

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In this domestic relations action, plaintiff appeals by leave granted two orders signed by the trial court on May 23, 2006. The first order reduced plaintiff's award of spousal support and the second amended a qualified domestic relations order (QDRO) to eliminate plaintiff's award of a survivor benefit under defendant's pension plan. We conclude that the trial court improperly modified the division of property by amending the QDRO to eliminate plaintiff's survivor benefit and erred when it modified plaintiff's award of spousal support without adequate record evidence and definite factual findings. Therefore, we reverse the trial court's opinion, vacate the orders of May 23, 2006, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

On September 14, 1993, the trial court entered the parties' consent judgment of divorce. The judgment of divorce provided that defendant must pay permanent alimony of \$125 per week to plaintiff until further order of the court. In addition, the judgment of divorce provided:

Plaintiff . . . shall be awarded fifty percent (50%) of the Defendant's monthly accrued benefit of his pension and retirement benefits with General Motors Corporation from the date of this marriage, December 1, 1978, until the date this Judgment of Divorce is filed with the Clerk of the Court. The terms of this award shall be set forth in a [QDRO].

At the same time that the individual parties approved of the form and content of the judgment of divorce,¹ the parties also approved of the QDRO referred to by the judgment of divorce. The trial court signed this QDRO on September 15, 1993.² The QDRO provided:

[Defendant] shall elect a benefit form that provides a survivor benefit (surviving spouse option). The survivor benefit shall be at least fifty percent (50%) of the benefit provided to [defendant] during [defendant's] life. [Defendant] shall designate [plaintiff] as the beneficiary of this survivor benefit unless [plaintiff] elects to receive her benefits in a form that provides either a lump-sum distribution or a life annuity, based on her life.

In March 2005, defendant moved to amend the QDRO to eliminate plaintiff's survivor benefit and to reduce or terminate his spousal support obligation. In his motion, defendant argued that, because the judgment of divorce did not specifically provide for an award of a survivor benefit under defendant's pension plan, the QDRO could not include such an award. Defendant also argued that changed circumstances warranted a reduction or termination of his spousal support obligation.

On January 31, 2006 the trial court issued an opinion in which the court agreed that the QDRO impermissibly included an award of survivor benefits to plaintiff and that changed circumstances warranted a reduction in defendant's spousal support obligation. Therefore, the trial court ordered the parties to draft an amended QDRO that does not award plaintiff a survivor benefit under defendant's pension. The trial court also ordered the parties to draft an order that reduced defendant's spousal support obligation to \$217.50 per month. On May 23, 2006, the trial court entered the orders amending the QDRO and reducing defendant's spousal support obligation. See MCR 2.602(A)(2).

This appeal followed.

II. Amendment of the QDRO

Plaintiff first argues that the trial court erred when it amended the QDRO to eliminate plaintiff's survivor benefit under defendant's pension. Specifically, plaintiff contends that the QDRO was essentially part of the judgment and, therefore, the trial court was without the authority to modify it more than twelve years after it was entered. We agree.

¹ The parties approved both the judgment of divorce and the QDRO as to form and content. Plaintiff signed the judgment of divorce on August 26, 1993 and her attorney signed it on September 7, 1993. Plaintiff's attorney signed the QDRO on August 26, 1993. Defendant and his attorney signed the judgment of divorce on September 1, 1993 and defendant's attorney signed the QDRO on the same day. The trial court signed the judgment of divorce on September 14, 1993 and the QDRO on September 15, 1993.

² The trial court amended this order on June 16, 1994, by stipulation of the parties, to correct the identification of the retirement plan.

Where a judgment of divorce is entered pursuant to an agreement of the parties, the agreement is a contract, which this Court will enforce absent a showing of factors such as fraud or duress. *In re Lobaina Estate*, 267 Mich App 415, 418; 705 NW2d 34 (2005). The proper interpretation of a contract is a matter of law that this Court reviews de novo. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005).

After a hearing held on August 26, 1993, the parties agreed to entry of a judgment of divorce. Each of the parties and their attorneys approved of the judgment as to both form and content. The judgment of divorce specifically provided that plaintiff would receive 50% of defendant's monthly-accrued benefit under his pension during the term of the marriage. The judgment further provided that "[t]he terms of this award shall be set forth in a [QDRO]." The QDRO mentioned in the judgment of divorce refers to the same August 26, 1993 hearing and was approved as to form and content by defendant's attorney on the same day that defendant and his attorney approved the judgment of divorce as to form and content. Further, in the QDRO, the parties clarified that it was their mutual intent "to provide [plaintiff] with a retirement payment that fairly represents what they have agreed to be her marital share of [defendant's] accrued retirement benefit" through the assignment provisions of the QDRO. Based on the totality of these circumstances, we conclude that the parties intended the judgment and the QDRO to be read together as a comprehensive division of the marital estate. Hence, the division of property described in the judgment incorporates by reference the substantive provisions of the QDRO.

Because the parties incorporated the substantive provisions of the QDRO into their judgment of divorce, we find the trial court's reliance on *Quade v Quade*, 238 Mich App 222; 604 NW2d 778 (1999) and *Roth v Roth*, 201 Mich App 563; 506 NW2d 900 (1993) for the proposition that the QDRO could not provide for a surviving spouse benefit to be misplaced. Neither case dealt with a QDRO that was incorporated into the judgment by reference and entered contemporaneously with the judgment.³ Instead, those cases addressed whether a QDRO entered after the entry of a judgment of divorce could include awards of property that were either precluded by the plain language of the judgment, see *Roth, supra* at 569, or not specifically included within the judgment of divorce, see *Quade, supra* at 224-225. Because the present case involves a contemporaneously executed QDRO that was incorporated into the judgment of divorce, its provisions must be treated as part of the settlement.

Because the QDRO addressed the division of marital property, the trial court was without the authority to modify those provisions absent fraud, duress, or mutual mistake. *Quade, supra* at 226. Likewise, to the extent that defendant's motion can be interpreted as a motion for relief from judgment under MCR 2.612, we conclude that the motion was untimely and unreasonable. See MCR 2.612(C)(2) and *Roth, supra* at 570. Therefore, the trial court erred when it entered an order amending the QDRO to alter its substantive provisions.

³ For this reason, we need not address plaintiff's argument that the trial court erred when it applied *Roth* and *Quade* retroactively.

III. Modification of Spousal Support

Plaintiff next argues that the trial court erred when it found that there was a sufficient change in circumstances to warrant modification of defendant's spousal support obligation. In the alternative, plaintiff contends that, at the very least, the trial court could not properly make such a determination without holding an evidentiary hearing. We agree that the trial court erred when it concluded that the spousal support should be modified without having held an evidentiary hearing.

The trial court's factual findings relating to its decision to modify spousal support are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655. This Court must affirm the trial court's decision regarding spousal support unless we are firmly convinced that it was inequitable. *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003).

An alimony award can be modified based upon a showing of new facts or changed circumstances. *Moore, supra* at 654; MCL 552.28. In the present case, the trial court's opinion clearly indicated that the trial court found that there were changed circumstances sufficient to warrant a modification of defendant's spousal support obligation. However, evidence of the changed circumstances must appear in the record. See *Rapaport v Rapaport*, 158 Mich App 741, 746; 405 NW2d 165 (1987). After review of the record, we conclude that there is inadequate evidence of the parties' financial status in the record to properly review the equity of the trial court's modification of the spousal support award. In such cases, it may be appropriate to remand for the taking of "supplemental and definite proof." *Bailey v Bailey*, 352 Mich 113, 118; 89 NW2d 500 (1958). Therefore, we vacate the trial court's order modifying defendant's spousal support obligation and remand this matter to the trial court. On remand, the trial court shall take evidence concerning the parties' finances and make the necessary findings of fact. After making its findings, the trial court shall issue a new order concerning whether to grant defendant's motion for a reduction in his spousal support obligation.

IV. Adoption Subsidy

Finally, plaintiff argues that the trial court erred in considering plaintiff's adoption subsidy is determining plaintiff's financial condition. Because this issue is almost certain to arise again on remand, we shall address it.

An adoptive parent may request adoption assistance, which can include a support subsidy. See MCL 400.115f(b) and 400.115g(1). However, the subsidy is meant to be a "payment for support of a child." MCL 400.115f(v). Because the subsidy is meant for the support of the child alone, it is not proper for a trial court to attribute this subsidy to the parent when determining whether the parent is entitled to spousal support. Therefore, on remand, the trial court shall not consider any adoption assistance currently received by plaintiff in determining whether and to what extent it should grant defendant's motion for modification of his spousal support obligation.

For the reasons stated above, we reverse the decision of the trial court, vacate the two orders entered on May 23, 2006, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette