STATE OF MICHIGAN

COURT OF APPEALS

VICKEY PRESLEY, Personal Representative of the ESTATE of WILLIAM F. KIRK, Plaintiff-Appellee, v JANET LYNN KIRK, Defendant-Appellant.	UNPUBLISHED March 11, 2014 No. 315641 St. Clair Circuit Court LC No. 93-002466-DM

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant, Janet Lynn Kirk, appeals by leave granted[1] an order granting a motion by plaintiff, Vickey Presley, as the personal representative of the estate of William Kirk, to amend the 1995 Qualified Domestic Relations Order (QDRO) entered following the 1994 consent judgment of divorce between Janet and William. We reverse and remand.

Janet and William were divorced on August 22, 1994. The consent judgment of divorce contained the following provision pertaining to William's pension benefits:

> PENSION
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> Defendant [Janet Kirk] shall receive 50% of the current value of the Plaintiff's [William Kirk's] pension for the period of time of the marriage and for which Defendant's attorney shall submit a Qualified Domestic Relations Order for entry with the Court.

On August 3, 1995, a QDRO was entered for the parties, which provided, in relevant part:

> 1. The Ford Motor Company-UAW Retirement Plan (the Plan) shall pay in accordance with the following to the Alternate Payee, JANET LYNN

[1] *Kirk v Kirk*, unpublished order of the Court of Appeals, entered May 10, 2013 (Docket No. 315641).

KIRK, shown below a portion of the retirement benefits otherwise payable to the Participant [William F. Kirk] shown below:

> a. The amount payable to the Alternate Payee shall equal 50% of Participant's non-contributory or supplemental benefit computed from the date of the marriage April 29, 1977, to August 22, 1994, the date of entry of the Consent Judgment of Divorce.
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> b. The alternate Payee shall be treated as a surviving spouse under the Plan and, accordingly, in the event of the death of the Participant before and after commencement of retirement benefits, payment shall be made to the Alternate Payee as provided in the Plan for a surviving spouse.
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> IT IS FURTHER ORDERED AND ADJUDGED that the QDRO is incorporated into the Consent Judgment of Divorce entered August 22, 1994, on behalf of the parties.

Both the consent judgment of divorce and the QDRO were signed only by the attorneys for the parties.

At some point after his divorce from Janet, William married Vickey Presley. William identified Presley as his spouse when he applied for receipt of his retirement benefits. Following William's death, Presley applied for surviving spouse benefits under his retirement plan, but her application was denied because Janet was already receiving benefits in accordance with the QDRO. Presley initiated the current action by filing a verified motion seeking to amend the QDRO under the original divorce action between Janet and William. The trial court granted Presley's motion to amend the QDRO to eliminate Janet's right to receive survivorship benefits.

On appeal, Janet contends the trial court erred in amending the QDRO. Although the trial court permitted amendment of the QDRO premised on the failure of that document to comport with the language of the consent judgment of divorce, Janet's appeal is focused on the trial court's later ruling in conjunction with her motion for reconsideration, that entry of the QDRO was in error based on the absence of evidence that William's attorney had the authority to sign that document and approve its entry with the trial court. To the extent that Janet challenges the trial court's order amending the QDRO based on the discrepancy in language between the judgment of divorce and the QDRO, the issue is preserved for this Court's review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 444; 695 NW2d 84 (2005). Because issues pertaining to the authorization of William's attorney to sign the QDRO were not fully addressed or raised until the motion for reconsideration, these issues are not properly preserved. *Vushaj v Farm Bureau Gen Ins*, 284 Mich App 513, 519; 773 NW2d 758 (2009). "Although this Court need not address an unpreserved issue, it may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts

necessary for its resolution have been presented." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010).

As discussed in *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012) (citations omitted):

> We review de novo the trial court's decision interpreting the . . . divorce judgment and the . . . QDRO. To 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 judgments entered pursuant to the agreement of parties are in the nature of a contract. In addition, we review de novo as a question of law issues involving a trial court's interpretation and application of court rules or statutes.

"Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). "'To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights.'" *Id.* at 328-329, citing *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

As a starting point, in *Quade v Quade*, 238 Mich App 222, 224-225; 604 NW2d 778 (1999), it was observed:

> [T]his Court has held that separate 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.

In the circumstances of this case, neither party disputes the absence of language in the 1994 consent judgment regarding an award of survivorship benefits to Janet. Rather, Janet contends that the subsequent entry of the QDRO, which included survivorship benefits, was permissible based on the agreement of the parties and that the QDRO served to complete the judgment of divorce. In rebuttal, Presley asserts that there is no evidence regarding the consensual nature of the QDRO because: (a) it was not signed by William, (b) it was drafted by Janet's attorney, (c) there is no documentation in the lower court file showing that William authorized his attorney's action in signing and entering the document, and (d) the QDRO was not entered contemporaneously with the judgment of divorce.

Janet contends that the QDRO in this matter was incorporated by the judgment of divorce. The consent judgment indicated only that Janet was to receive "50% of the current value of [William's] pension for the period of the time of the marriage" and directed Janet's attorney to prepare a QDRO for entry with the trial court. Rather than incorporating the yet-to-be-drafted QDRO into the judgment, the judgment indicated that the parties were to cooperate in

the execution and delivery of "all documents necessary to carry out the terms of this judgment" and that failure to comply would permit filing or recording of the judgment to have "the same effect as though said . . . document had been personally executed by the failing party." The QDRO, however, contained language indicating its incorporation into the judgment of divorce.

Our discussion in this case is controlled by Neville *supra* where the Court held that parties are free to modify a consent judgment of divorce by mutual consent with a subsequently entered QDRO. The Court stated in *Neville v Neville*, 295 Mich App 460, 471; 812 NW2d 816, 823 (2012):

> As discussed previously, the March 14, 1995, QDRO is properly treated as part of the final divorce judgment. Given that the parties were free to modify the terms of their November 1994 property settlement through mutual assent, any changes to those property-settlement provisions as reflected in the March 1995 QDRO are controlling.
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> . . .
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> As discussed previously, the requirement that a QDRO be subsequently entered also establishes that the November 14, 1994, divorce judgment did not conclusively establish the terms of the property division.[2] *Mixon,* 237 Mich.App. at 166, 602 N.W.2d 406. Because the parties were free to modify the terms of their property settlement when approving the March 14, 1995, QDRO, *Adell Broadcasting,* 269 Mich.App. at 11, 708 N.W.2d 778, we conclude that the trial court erred by crafting a formula for plaintiff's share of defendant's retirement benefits that differed from that QDRO.

Neville v Neville, 295 Mich App 460, 473; 812 NW2d 816, 824 (2012).

All that remains to be addressed is Janet's contention on appeal that the trial court erred in permitting amendment of the QDRO premised on a determination that the document is invalid under MCR 2.117 based on the absence of evidence that Leslie Kutinsky, William's counsel of record for the divorce action, was authorized to sign the document on William's behalf more than a year following the conclusion of his representation after entry of the consent judgment of divorce.

In the lower court, Presley initially implied fraud or misconduct in alleging that the failure of William to sign the QDRO, given the delay in entry of that document, made its consensual nature suspect. Notably, this was not the basis on which the trial court ruled to amend the QDRO. It was only in response to Janet's motion for reconsideration that Presley developed an argument, with the trial court's participation, that the absence of William's signature, without evidence that he authorized his divorce counsel to sign the QDRO, necessitated a presumption under MCR 2.117 that the attorney's signature was unauthorized, thereby rendering the document void. The argument constitutes a red herring.

First, any implication of fraud would need to be pleaded with particularity and not merely implied. *Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 284; 803 NW2d 151 (2011), citing MCR 2.112(B)(1). Second, if Presley is asserting fraud, her claim is time-barred

because it runs afoul of MCR 2.612(C)(1)(c), (C)(2). Third, although Presley does not specifically label her claim as one of fraud, the burden of proof is placed on her as "the party alleging the invalidity." *Matter of Benker's Estate*, 416 Mich 681, 691; 331 NW2d 193 (1982). The mere existence of a document signed by William to the administrator of his retirement plan indicating that Presley was his current wife and electing a reduction of benefits premised on a surviving spouse does not implicate or evidence whether William authorized counsel to continue his representation for entry of a QDRO signed over 10 years earlier.

Further, the trial court and Presley misconstrue the language of MCR 2.117(B), which provides in relevant part:

> (1) *In General*. An attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party.

There is nothing in the language of the rule requiring an attorney also file an appearance with the court in a situation where representation is continuing. To the contrary, MCR 2.117(B)(2)(a) states:

> If an appearance is made in a manner not involving the filing of a paper with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. . . .

Although Kutinsky's obligation to William naturally terminated upon the expiration of the appeal period following the entry of the consent judgment of divorce, the rule does not preclude his continued retention through acts performed on his client's behalf. MCR 2.117. In addition, "It is a universal rule that an attorney-at-law is presumed to have authority to represent a party litigant for whom he appears." *August v Collins*, 265 Mich 389, 396; 251 NW 565 (1933). If a party disputes an attorney's authority to engage in the representation, "he must proceed promptly and unequivocally to repudiate the appearance and to permit no more acts thereunder. Failure to disapprove works ratification." *Id*. This did not occur.

While it is also recognized that "[t]he party for whom the appearance has been entered, if without knowledge of that fact, may object at any time on being informed thereof, even after judgment," *August*, 265 Mich at 396 (emphasis added, internal quotation omitted), Presley again fails to come forward with anything other than rank speculation that William was unaware of the entry of the QDRO. Such an assertion is certainly questionable given William's presence at the hearing for entry of the consent judgment of divorce where he was clearly privy to the trial court's direction regarding the necessity of preparing a QDRO. In addition, documentation received from his retirement plan administrator specifically referenced the existence of a QDRO. Presley has not fulfilled her burden of proof.

Because the trial court's ruling permitting amendment of the QDRO affected Janet's substantial rights, we reverse the trial court's decision granting Presley's motion to amend the QDRO.

Based on our ruling, the remaining issues on appeal are rendered moot, and we decline to address them. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

We reverse the trial court's order granting Presley's motion to amend the QDRO, vacate the amended QDRO, and remand to the trial court to reinstate the original QDRO. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens