

2011 IL App (2d) 110070-U
No. 2-11-0070
Order filed September 23, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
GARY VICIAN,)	of Du Page County.
)	
Petitioner-Appellant,)	
)	
and)	No. 02-D-2025
)	
KATHLEEN VICIAN,)	Honorable
)	John W. Demling,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: Trial court's use of the *Hunt* formula to allocate husband's pension was not contrary to section 503(d) of the Illinois Marriage and Dissolution of Marriage Act.

¶ 1 On September 8, 2010, the circuit court of Du Page County entered a Qualified Illinois Domestic Relations Order (QILDRO) providing for the distribution of the marital portion of the teachers' pension belonging to the petitioner, Gary Vician. Following the denial of his motion for reconsideration, Gary filed this appeal, arguing that the trial court's order had the effect of improperly awarding his non-marital property to the respondent, Kathleen Vician. We affirm.

¶ 2

BACKGROUND

¶ 3 Gary and Kathleen were married in 1984. On December 22, 2003, a judgment dissolving their marriage was entered. The judgment incorporated a marital settlement agreement that contained, among other things, the following provision regarding Gary's teachers' pension:

“GARY and KATHLEEN each shall become sole and exclusive owner of FIFTY PERCENT (50%) of the marital portion of the value, rights, benefits and interest in each and every one of GARY's work-related benefit plans as of the effective date of this Agreement. This division and distribution of the marital portion of the value, rights, benefits and interest in each such plan shall be pursuant to a Qualified Domestic Relations Order (“QDRO”) or QILDRO, as the case may be, and, the entry of this QDRO or QILDRO shall be done in connection with this written marital settlement agreement and the entry of a Judgment of Dissolution of Marriage (divorce decree) which incorporates this written marital settlement agreement. Each Party shall be entitled to receive that Party's distributions from that Party's above-mentioned share of each such plan only in accordance with the terms of said plan.

* * *”

Kathleen's work-related retirement benefit plans were to be divided and distributed in an identical fashion. No QDROs or QILDROs were entered at the time of the divorce.

¶ 4 Gary retired from teaching on June 11, 2009. In November 2009, Kathleen filed a petition for a rule to show cause, alleging that Gary had failed to pay her her share of his retirement benefits and would not cooperate in the entry of a QILDRO as required by the judgment for dissolution. Following briefing by the parties, the trial court held a hearing on the petition in June 2010. Gary contended (1) that the language of the marital settlement agreement reflected the parties' intent to

value the marital portion of his pension as of the date of dissolution, and (2) that valuing the marital portion as of the date of his retirement (as Kathleen sought to do) would unfairly give her the benefit of the years he continued working after the divorce. Gary asserted that in fact there had been a valuation of his pension at the time of the divorce. However, he conceded that no such valuation was contained in the marital settlement agreement or the judgment for dissolution.

¶ 5 On July 30, 2010, the trial court delivered its ruling from the bench. The trial court stated that it agreed with Gary that, by valuing the pension as of the date of retirement rather than the date of dissolution, the value of Kathleen's share of the marital portion was indeed increased. Nevertheless, the court found that the facts in this case were the same as those in *In re Marriage of Richardson*, 381 Ill. App. 3d 47 (2008). In *Richardson*, the parties agreed that, in entering into their marital settlement agreement, they intended for the wife to receive one-half of the marital portion of the pension (which, as in the case at hand, was a defined-benefit pension), but they did not agree how that portion was to be calculated. The *Richardson* trial court found that the formula laid out in *In re the Marriage of Hunt*, 78 Ill. App. 3d 653 (1979), was the appropriate way to value the marital portion of the pension. Under the *Hunt* formula, the marital portion of a pension is determined by dividing the number of months of the pension that accrued during the marriage by the total number of months during which the pension holder accrued pension benefits. That marital portion is then divided between the spouses as provided in the judgment for dissolution. Here, the trial court found that, because of the factual similarities with this case, *Richardson* was controlling. The trial court directed the parties to prepare draft QDROs (for Kathleen's retirement benefit plans) and a QILDRO (for Gary's pension) applying the *Hunt* formula. The court also found that Gary was not in contempt

of court for his previous failure to pay Kathleen retirement benefits, but ordered him to make up the arrearage.

¶ 6 On September 8, 2010, the trial court entered a QILDRO calculation order and a QILDRO based on those calculations. The calculation order stated that Gary had accumulated pension benefits during 396 months (the time between the date on which he first started accruing those benefits and his retirement in June 2009). Gary's marriage to Kathleen encompassed 230 months of this total. Applying the *Hunt* formula, the marital portion of Gary's monthly pension benefit was \$3,514.66 (230 divided by 396 was 58.0808%, multiplied by the \$6,051.32 total monthly benefit). As the marital settlement agreement provided that this marital portion was to be divided equally between the parties, Kathleen would receive \$1,757.33 per month from Gary's pension.

¶ 7 Gary filed a motion to reconsider, again arguing that the language of the marital settlement showed that the parties intended to value the pension at the date of dissolution. Gary pointed to the language (1) regarding the parties each becoming the "owner" of one-half of his pension as of the date of dissolution and (2) stating that the entry of a QILDRO was to be done "in connection with" the entry of the judgment for dissolution. In the course of arguing the motion, Gary also advised the court that, if he had retired on the date of the dissolution, his monthly benefit would have been only \$2,008.61, according to a calculation performed by a third party. (The record does not show that any evidence supporting this statement was ever tendered to or admitted by the trial court.) Gary contended that his post-dissolution contributions to his pension were the sole reason for the increase in the monthly benefit, and argued that Kathleen was not entitled to share in this "non-marital" increase in his benefit. Gary argued that, because the most that Kathleen could have received at the time of the dissolution was approximately \$1,000 (half of the total monthly benefit), the years he had

worked after the dissolution resulted in a “windfall” to Kathleen of approximately \$700 per month. Kathleen responded that the marital settlement did not reflect any intent to value Gary’s pension as of the date of dissolution, as it did not include, for instance, the monetary value of the pension or any provisions for the immediate payout of her share. The marital settlement agreement also provided that each party’s distributions from the pension would be made only in accordance with the terms of the plan, and under the plan Gary was not entitled to any distributions at the time of the dissolution. Finally, the pension could not be properly valued until after Gary retired, because under state law Gary’s pension benefit had to be calculated with reference to his final rate of pay and that rate could not be known until he retired. Thus, she argued, the marital settlement agreement reflected an understanding that (1) as of the date of dissolution, each party owned an equal share of the marital portion of the pension, but (2) that portion would be calculated at a future date. On December 14, 2010, the trial court reaffirmed its original conclusion that the case was factually similar to *Richardson* and it denied the motion for reconsideration. Gary filed a timely appeal.

¶ 8

ANALYSIS

¶ 9 On appeal, Gary raises two arguments. He argues that the trial court erred in finding that the parties did not intend to value their respective interests in Gary’s pension as of the date of dissolution. As the interpretation of a contract such as a marital settlement agreement is a matter of law, we review the trial court’s decision *de novo*. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 166 (2010). Gary also argues that the trial court erred when it included his “non-marital time and contributions” to his pension when determining the value of the marital portion of the pension, because doing so was contrary to section 503(d) of the Illinois Marriage and Dissolution of Marriage

Act (Act) (750 ILCS 5/503(d) (West 2008)). This purely legal argument is likewise reviewed *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 10 We begin with the issue of the parties' intent regarding the valuation of Gary's pension, as reflected by the language of the provision relating to that pension. The language of a contract is ordinarily the best indication of the parties' intent, and when the terms used in a contract are clear and unambiguous, a court must interpret the contract to give effect to those terms. *In re Marriage of Thomas*, 339 Ill. App. 3d 214, 228 (2003). A term is not ambiguous simply because the parties disagree about the meaning of it. *Id.* In construing a contract, we must read all of its terms together and interpret it in such a way as to give effect to all of those terms if possible. *In re Marriage of Mulry*, 314 Ill. App. 3d 756, 760 (2000).

¶ 11 Gary argues that, because the pension provision here refers to each party becoming the sole owner of one-half of the marital portion of the pension "as of the effective date" of the marital settlement, the pension must be valued as of that date. However, this language simply sets a date when each party's ownership of his or her share of the marital portion of the pension will commence. It says nothing about the value of that interest, nor about when that value should be determined.

¶ 12 Gary also points to the agreement's language that the QILDRO dividing the marital portion of his pension "shall be" entered "in connection with" the entry of the judgment for dissolution, and argues that this language supports his contention that the pension must be valued as of the date of the dissolution. Again, however, he seeks to read this language too broadly: the phrase "in connection with" indicates only that the parties intended the QILDRO to relate to and reflect the terms of the marital settlement agreement and judgment for dissolution and does not set any particular time frame for execution. Even if the parties did contemplate that a QILDRO would be

entered contemporaneously with the judgment for dissolution, neither party sought to do so, and there is no indication that the time of the QILDRO's entry was viewed as having any particular significance.

¶ 13 Gary's arguments are significantly undercut by the fact that the pension had not vested or matured on the date the dissolution judgment was entered. Under the terms of his pension, Gary could not receive distributions of his pension benefits until he had attained a certain age or number of years in service, and there is no evidence that either of these numbers had been reached by the date of the dissolution judgment. Gary's pension thus was not subject to immediate distribution on the effective date of the marital settlement, nor is there any evidence that either party believed that this would be the case. Accordingly, there was no need to value the pension as of the date of dissolution, and there is no basis for reading a requirement for immediate valuation into the marital settlement agreement.

¶ 14 Under Illinois law, there are two possible methods for valuing an unmatured pension in a dissolution proceeding, the "immediate offset" approach and the "reserved jurisdiction" approach. Under the first approach, "the court determines the present value of a pension benefit, awards the value of the benefit to the employee spouse[,] and offsets that award with an award of marital property to the nonemployee spouse." *Richardson*, 381 Ill. App. 3d at 53-54. This approach typically requires evidence regarding the total present value of the pension (not simply the level of monthly benefits that would be paid if the employee spouse were able to retire at the time of the dissolution), and involves a lump-sum payment to the nonemployee spouse. In finalizing the dissolution, Gary did not offer any evidence of the present value of the marital portion of his pension, nor does he now contend that the trial court should have used the "immediate offset" approach and

awarded him the value of his pension while giving marital property worth an equal amount to Kathleen. The record and arguments thus support the conclusion that neither party intended to use the “immediate offset” approach.

¶ 15 The second approach, often called the “reserved jurisdiction” approach, is generally used when the value of the pension is difficult to determine at the time of the dissolution. Under this approach, the nonemployee spouse is not immediately compensated for the value of his or her share of the pension. *Id.* at 54. Instead, the nonemployee spouse is awarded a percentage of the marital interest in the pension, and the court retains jurisdiction in order to ensure payment of that percentage interest when the pension eventually becomes payable. *Id.*, citing *Hunt*, 78 Ill. App. 3d at 663. This approach is especially appropriate when a pension interest that is subject to division has not vested at the time of the dissolution, because “it divides the risk that a pension will fail to vest.” *Id.* In light of the lack of any indication in the marital settlement agreement that the parties intended to use the “immediate offset” approach, we find that the agreement necessarily contemplated that the “reserved jurisdiction” approach would be used. The “reserved jurisdiction” approach, and the *Hunt* formula that is used to implement it, are “widely accepted by Illinois courts in allocating the division of unmatured pension interests.” *Id.* at 52 (citing cases).

¶ 16 Gary contends that, under section 503(f) of the Act, marital assets must be valued as close to the date of the dissolution as practicable. 750 ILCS 5/503(f) (West 2008). We recognize the importance of this requirement, but in this instance the key phrase is “as practicable.” As noted, Gary’s pension had not vested at the time of the dissolution and the value of his eventual monthly benefit would have been difficult to calculate before his retirement. Gary argues that they did in fact obtain such a valuation, but there is no evidence in the record of any such valuation, much less how

it was derived. Lacking any such valuation from the time of the dissolution, the trial court properly applied the *Hunt* formula.

¶ 17 In sum, we must read the marital settlement agreement as a whole (*Mulry*, 314 Ill. App. 3d at 760), and doing so yields the firm conclusion that the parties intended to take the “reserved jurisdiction” approach to valuing the marital portion of Gary’s pension. The parties agreed to split equally the marital portion of Gary’s pension, and yet they did not set a value on that marital asset, nor seek to reimburse Kathleen immediately for that her share of it. It is thus clear that they intended to value the pension, and divide the marital portion of it, at a later date. See *In re Marriage of Culp*, 399 Ill. App. 3d 542, 5 (2010) (the parties intended that the wife would receive an equal share of the marital portion of the husband’s pension once it had fully matured where there was no award to wife of a lump sum at the time of dissolution). This intent was sensible in light of the practical difficulties involved in attempting to place a present value on the pension, such as properly accounting for the time value of money and the risk that the pension would never be paid out (as could occur if Gary stopped working or died before the pension became payable). The marital settlement agreement supports the QILDRO entered by the trial court.

¶ 18 Gary’s final argument on appeal is that, even if the *Hunt* formula was properly applied here under the marital settlement agreement, that formula violates the mandate of section 503(d) of the Act (750 ILCS 5/503(d) (West 2008)) (“the court shall assign each spouse’s non-marital property to that spouse”) because it assigns his non-marital property to Kathleen. Gary notes that, under section 503(a) of the Act, property acquired either before the marriage begins or after it ends is non-marital property. Gary’s argument rests on the premise that the time he worked and the contributions he made in the five-and-a-half years after his divorce and before his retirement were non-marital

(that is, they did not occur during the marriage), and thus the increase in his pension benefit that occurred in those years is also non-marital property. Gary points out that his benefit was determined primarily by his earnings during the last few years before his retirement, a period that occurred outside of the marriage. He argues that, under section 503 of the Act, the increase in his pension benefit between the time of dissolution and his retirement must be regarded as purely non-marital, and thus the *Hunt* formula's consideration of his total pension benefit when calculating the marital portion violates the Act.

¶ 19 The flaw in Gary's reasoning is that the current level of his pension benefits, including the increase that occurred after his marriage ended, is the result of not only of his post-dissolution efforts but also the 19 years of his employment during the marriage. Gary's pension would not have reached its current level, and would not have been based on a final few years of relatively higher earnings, if it were based solely on the five-and-a-half years he worked after the marriage coupled with the years he worked prior to the marriage. (Here we assume, for the purpose of the discussion, that Gary would still have had the age or time in service necessary to retire in 2009 even if his 19 years of teaching during the marriage were not considered. In reality, of course, that is unlikely.) As Gary concedes, teacher pay levels are cumulative, with increases based on the previous level achieved. See *Culp*, 399 Ill. App. 3d at 548. Here, more than half of Gary's teaching employment occurred during the marriage. It is only because of the pay increases that Gary achieved during the marriage that his pension benefits were able to increase as they did after his marriage. Thus, in a very real sense, at least half of the increase in Gary's pension benefit that occurred after his divorce resulted from the time and contributions he put in during his marriage. Under the Act, this portion of the increase is marital, not non-marital. *Id.* at 548-49 ("Because each year of service contributes

to the overall value of the pension, the marital portion of the pension increases in value the longer the pension holder works.”). The *Hunt* formula appropriately captures the value added to a pension as the result of marital contributions in utilizing both the total time of participation in the pension plan and the portion of that participation that occurred during the marriage, and applying that ratio to the final level of pension benefits. The *Hunt* formula ensures that the benefits Kathleen receives are based not on Gary’s entire pension, but only on that portion of it attributable to his contributions and service during the marriage. Accordingly, it does not violate the Act.

¶ 20

CONCLUSION

¶ 21 The judgment of the circuit court of Du Page County is affirmed.

¶ 22 Affirmed.