

NOTICE

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2014 IL App (4th) 130475-U

NO. 4-13-0475

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 17, 2014

Carla Bender

4th District Appellate

Court, IL

| | | |
|-------------------------------------|---|---------------------|
| In re: MARRIAGE OF RITA KAY CARTER, |) | Appeal from |
| Petitioner-Appellee, |) | Circuit Court of |
| and |) | Champaign County |
| JACK H. CARTER, JR., |) | No. 94C1606 |
| Respondent-Appellant. |) | |
| |) | Honorable |
| |) | Arnold F. Blockman, |
| |) | Judge Presiding. |

PRESIDING JUSTICE APPLETON delivered the judgment of the court. Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court correctly interpreted its prior order as requiring respondent to pay petitioner a portion of his disability pension, and contrary to respondent's contention, this requirement violates neither section 1-119 of the Illinois Pension Code (40 ILCS 5/1-119 (West 2012)) nor the pension protection clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 5).

¶ 2 Petitioner is Rita Kay Carter, and respondent is her former spouse, Jack H. Carter, Jr. Petitioner requested the trial court to interpret an "Order Regarding Pension Benefits," which the court issued in April 1996, in the proceeding for the dissolution of their marriage. (Because the order was more than 30 days old, the court had subject matter jurisdiction only to interpret and enforce the order (see *In re Marriage of Adamson & Cosner*, 308 Ill. App. 3d 759, 765 (1999); *In re Marriage of Steel*, 195 Ill. App. 3d 348, 354 (1990)), not to modify it (see *Adamson*, 308 Ill. App. 3d at 765; *In re Marriage of Kane*, 249 Ill. App. 3d 412, 414 (1993)). By

petitioner's understanding, the order required respondent to pay her a portion of the *disability* benefits he was receiving from the Champaign Fireman's Pension Fund. Respondent disagreed with her interpretation; he argued that the order applied only to *retirement* benefits, not to disability benefits. The court agreed with petitioner's interpretation and ordered respondent to pay petitioner a portion of his disability benefits in accordance with a formula in the April 1996 order. Respondent appeals.

¶ 3 We hold that the trial court correctly interpreted its prior order as requiring respondent to pay petitioner a portion of his disability pension. Contrary to respondent's contention, this requirement violates neither section 1-119 of the Illinois Pension Code (40 ILCS 5/1-119 (West 2012)) nor the pension protection clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 5). Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Judgment of Dissolution

¶ 6 On October 16, 1995, the trial court entered a judgment dissolving the parties' marriage. The judgment approved and incorporated by reference a marital settlement agreement, which the parties executed on October 5, 1995.

¶ 7 In the marital settlement agreement, the parties agreed that petitioner should receive half of respondent's interest in the Champaign Fireman's Pension Fund. The relevant paragraph of the agreement reads as follows:

"9. During the marriage, Jack accumulated retirement annuity benefits through the Champaign Fireman's Pension Fund and Rita shall be awarded one-half (1/2) of the portion of Jack's

interest in said pension fund that was accumulated during the marriage of the parties hereto. The parties agree that the marital portion of the benefits accrued by Jack under said plan amount to seventeen years of benefits and that if Jack were to retire today he would receive a benefit in the amount of 37.4% of current salary (\$37,734.62). The parties are unable to agree to a specific dollar amount or formula for calculating the amount of Rita's interest in said plan and resolution of this issue shall be reserved for future consideration."

¶ 8 Likewise, the judgment of dissolution provides: "The issue of calculating the formula for determining the amount of the Petitioner's interest in the Respondent's retirement plan shall be resolved by subsequent agreement of the parties or subsequent Court order."

¶ 9 B. The "Order Regarding Pension Benefits"

¶ 10 On April 30, 1996, the trial court entered an "Order Regarding Pension Benefits." The order contains numbered findings, followed by a decree. Having been "fully advised in the premises," the court "finds":

"1. That on October 10, 1995, the Judgment of Dissolution of Marriage was entered herein which resolved all issues in the dissolution proceeding except for the issue of determining the amount of Petitioner's interest in Respondent's retirement plan which was reserved for future consideration.

2. That the Respondent is employed by the City of

Champaign as a firefighter and has a[n] interest, therefore, in the pension plan associated with the City of Champaign, commonly known as the 'Champaign Fireman's Pension Fund.'

3. That throughout the parties' marriage, Respondent was employed and accumulated retirement benefits to [sic] the Champaign Fireman's Pension Fund.

4. That Petitioner is entitled to a fractional share of any pension benefits generated under said Champaign Fireman's Pension Fund to be determined as follows: Fifty percent times a fraction, the numerator of which is the number of years during which the benefits accrued under the plan during the marriage of the parties hereto, and the denominator of which is the number of years (seventeen (17) years) during which benefits accrued to Respondent under the plan, multiplied times the gross amount of any pension benefit actually received by Respondent upon retirement or under the terms and conditions of the plan.

5. Further, that Petitioner shall be responsible for paying any income tax attributable to her receipt of the share of retirement benefits.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

Petitioner's interest in the Respondent's benefits through the

Champaign Fireman's Pension Fund shall be a fractional interest as is set forth in the findings of this Court, which said findings are approved and confirmed and entered as an order of this Court."

¶ 11 C. The Petition To Determine the Marital Portion
of Respondent's Pension

¶ 12 On December 18, 2012, petitioner filed a pleading entitled "Petition To Determine Marital Portion of Respondent's Champaign Fireman's Pension Fund." In her petition, she alleged that respondent "ha[d] retired from the Champaign Fire Department" and that consequently the trial court "should determine the marital portion of [his] Champaign Fireman's Pension Fund."

¶ 13 D. Stipulation

¶ 14 On March 22, 2013, the parties filed a stipulation with the trial court. They stipulated as follows:

"1. Respondent is 57 years of age.

2. Respondent has worked for the Champaign Fire Department for approximately 33 years, 8 months and 24 days (as of October, 2012).

3. Firefighters in the Champaign Fire Department participate in a pension fund governed by Article 4 of the Illinois Pension Code.

4. Firefighters in [the] Article 4 Fund are eligible to retire after reaching the age of 50, with 20 years of active service.

5. A participant in an Article 4 Fund is eligible for a duty

disability pension after five years of active service.

6. A participant in an Article 4 Fund is eligible for a non-duty disability pension after seven years of active duty.

7. Respondent was injured in the line of duty and applied for a disability pension pursuant to 4-110 of the Pension Code.

8. After three medical examinations and a hearing as required by the Code, Respondent was awarded a duty disability pension (4-112 of the Code).

9. Pursuant to 4-112 of the Code, Respondent may be returned to active duty upon proof that he has recovered from his disability.

10. There is no mandatory retirement age for firefighters in Article 4 plans.

11. Respondent was awarded a pension of 65% of the salary attached to his rank in the amount of \$4,538.19 per month.

12. Respondent has an option, pursuant to 4-113 of the Code, to elect to retire and, thereafter, receive annual increases in his retirement pension. Pursuant to that section, if Respondent elected to retire, his initial retirement pension would equal \$4,538.19.

13. The disability pension and the initial retirement pension, according to the terms of the statute, would be \$4,538.19.

14. Champaign Firefighter's Local 1260 lists Respondent as retired on its website.

15. At the time of his disabling injury, Respondent had no intention to retire from the Champaign Fire Department."

¶ 15

II. ANALYSIS

¶ 16

A. The Meaning of the "Order Regarding Pension Benefits"

¶ 17

1. *The Scope of the Decretal Provision in the Order*

¶ 18

For eligible firefighters in municipalities with no more than 500,000 inhabitants (such as Champaign), the Illinois Pension Code (40 ILCS 5/1-101 to 24-109 (West 2012)) provides a retirement pension (40 ILCS 5/4-109 (West 2012)) and, alternatively, a disability pension (40 ILCS 5/4-110, 4-111 (West 2012)). These are both called "pensions." 40 ILCS 5/4-109(a), (b) (West 2012). They also are called "benefits." 40 ILCS 5/4-105d, 4-107, 4-112 (West 2012).

¶ 19

Respondent argues the trial court misinterpreted its prior order, the "Order Regarding Pension Benefits." In respondent's view, the order applies only to retirement benefits, not to disability benefits. He notes that the order refers to a "retirement plan" (in paragraph 1), to "accumulated retirement benefits" (in paragraph 3), and to "retirement benefits" (in paragraph 5), but that it nowhere mentions "disability benefits"—which, he says, do not "accumulate." He argues it is untenable to apply the order to a type of pension, a disability pension, about which the order is silent.

¶ 20

We interpret judgments *de novo* (*In re Marriage of Avery*, 251 Ill. App. 3d 648, 652 (1993)), and we disagree that the order in question is silent as to a disability pension.

Granted, the order does not use the term "disability," but in its concluding decretal provision, the order addresses "Petitioner's interest in the Respondent's benefits through the Champaign Fireman's Pension Fund." His "benefits through the Champaign Fireman's Pension Fund" include disability benefits. The decretal provision reads as follows:

"WHEREFORE, IT IS ORDERED, ADJUDGED AND
DECREED THAT:

Petitioner's interest in the Respondent's benefits through the Champaign Fireman's Pension Fund shall be a fractional interest as is set forth in the findings of this Court, which said findings are approved and confirmed and entered as an order of this Court."

¶ 21 Paragraph 4 of the findings describes this "fractional interest." That paragraph reads as follows:

"4. That Petitioner is entitled to a fractional share of any pension benefits generated under said Champaign Fireman's Pension Fund to be determined as follows: Fifty percent times a fraction, the numerator of which is the number of years during which the benefits accrued under the plan during the marriage of the parties hereto, and the denominator of which is the number of years (seventeen (17) years) during which benefits accrued to Respondent under the plan, multiplied times the gross amount of any pension benefit actually received by Respondent upon retirement or under the terms and conditions of the plan."

¶ 22 On its face, the phrase "*any* pension benefits generated under said Champaign Fireman's Pension Fund" does not mean only one kind of benefit, *i.e.*, a retirement pension; rather, it means what it says: any benefit, regardless of whether the benefit is a retirement pension or a disability pension. (Emphasis added.) Although, as respondent observes, other numbered paragraphs of the findings refer specifically to retirement benefits, the operative provision of the judgment, the decretal provision, is not limited to retirement benefits. Instead, it refers generally to "benefits."

¶ 23 Also, as Judge Blockman notes in his thorough and well reasoned decision, the final clause of the formula in paragraph 4 dispels any notion that the court meant only retirement benefits. The final clause refers to "*any* pension benefit actually received by Respondent upon retirement *or under the terms and conditions of the plan.*" (Emphases added.) If, as respondent contends, the court meant only retirement benefits in its "Order Regarding Pension Benefits," the final emphasized adverbial phrase would be superfluous. The only pension benefit respondent would receive "upon retirement" is a retirement pension. If, in its "Order Regarding Pension Benefits," the court were concerned only with a retirement pension, it would have had no reason, after referring to a "pension benefit actually received by Respondent upon retirement," to refer *alternatively*—by the conjunction "or"—to a "pension benefit actually received by Respondent *** under the terms and conditions of the plan."

¶ 24 In short, the references in the findings to retirement benefits do not limit the decretal provision of the order to retirement benefits. The language of the decretal provision does not allow such a limitation.

¶ 25 *2. The Ways in Which Belk Is Distinguishable*

¶ 26 Respondent urges us to follow *In re Marriage of Belk*, 239 Ill. App. 3d 806 (1992), by interpreting the "Order Regarding Pension Benefits" to apply only to retirement benefits. We find *Belk*, however, to be distinguishable. Before explaining the ways in which *Belk* is distinguishable, we will lay out the facts in that case.

¶ 27 Allen and Diane Belk married in 1970, and the trial court dissolved their marriage on March 22, 1991. *Id.* at 807. For nine years preceding the dissolution, Allen was employed as a police officer for the city of Savanna. *Id.* He was a participant in the pension plan for Savanna police officers. *Id.*

¶ 28 The judgment of dissolution incorporated the following stipulation regarding Allen's pension plan (and in this context, the "counter-petitioner" is Diane, and the "counter-respondent" is Allen):

" '12. That the Parties have stipulated that the Counter-[petitioner] has no pension; that the Counter-[respondent's] pension plan is marital property; that the Counter-[petitioner] shall receive the following portion of the Counter-[respondent's] pension: 50% of a fraction, the numerator being the number of months the Counter-[respondent] was in the pension plan during the Parties' marriage and the denominator [*sic*] being the number of months the Counter-[respondent] was in the pension plan; and that said portion will be paid to the Counter-[petitioner] when and at the time the Counter-[respondent] withdraws any amounts from his pension plan or he is paid any benefits under said plan.' " *Id.*

The judgment of dissolution noted the parties' stipulation that Diane " 'ha[d] no pension.' " *Id.* at 809. Also, the judgment made a finding that "Diane ha[d] no pension plan at this time 'other than Social Security benefits that she would obtain as a result of her earnings.' " *Id.* at 809-10.

¶ 29 Nine days after the entry of the judgment of dissolution, Allen sustained serious injuries in a vehicular accident, which had nothing to do with his job as a police officer. *Id.* at 807. He no longer could work, and pursuant to section 3-114.2 of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 3-114.2), the Savanna police pension board awarded him a nonduty-related disability pension in the amount of 50% of his salary. *Belk*, 239 Ill. App. 3d at 807.

¶ 30 Diane argued to the trial court that by the terms of paragraph 12 of the stipulation, she was entitled to half of Allen's disability pension. *Id.* at 808. Allen disagreed. He argued that the stipulation applied only to a retirement pension, not to a disability pension. *Id.* The trial court agreed with Diane's interpretation of the stipulation. *Id.* The appellate court, however, reversed the trial court's judgment. *Id.* at 814. For six reasons, the appellate court rejected Diane's interpretation and agreed with Allen that the stipulation was inapplicable to his disability pension. We will recount those six reasons, and in the process, we will explain why *Belk* is distinguishable.

¶ 31 First, the appellate court stated: "The total absence [(in the stipulation)] of an express, or at least a strongly implied, reference to disability or disability benefits is persuasive that such benefits were not in the parties' contemplation at the time of dissolution." *Id.* at 810. In the present case, by contrast, there is a strongly implied reference to disability benefits, as the trial court recognized. The reference is in the alternative clauses at the end of paragraph 4 of the

"Order Regarding Pension Benefits": "any pension benefit actually received by Respondent upon retirement *or* under the terms and conditions of the plan." (Emphasis added.)

¶ 32 Second, in *Belk*, "the repeated finding that Diane had no pension together with the finding that she was currently employed and that she waived maintenance" suggested that "the parties were focused on the pension which normally comes due when employees reach retirement age and stop working." *Id.* In the present case, the judgment of dissolution contains an isolated reference to petitioner's employment—she was "currently employed by Merry Maids"—and it contains a waiver of maintenance by both parties, but it does not mention whether petitioner has a pension.

¶ 33 Third, it would have been unreasonable to suppose that the parties in *Belk* intended a division of Allen's disability pension, considering that Diane was working full-time whereas he could not work, his salary already was cut in half, he had to pay child support, and the harshness of such an outcome would have been unmitigated by the half-and-half distribution of marital property the trial court had ordered. *Id.* *Belk* does not appear to suggest, however, that if Allen (like respondent in the present case) were eligible to collect a retirement pension, dividing that type of pension between him and Diane would have been harsh and unfair. In the present case, respondent is eligible to collect a retirement pension, and he is collecting a disability pension in lieu of a retirement pension. Because respondent is listed as retired on the union's website, one might consider this state of affairs as a strategy to defeat petitioner's interest in his pension plan—a strategy the trial court probably never intended to allow.

¶ 34 Fourth, by their remarks in a hearing on ancillary matters, the attorneys in *Belk* appeared to contemplate dividing only Allen's retirement pension. *Id.* at 811-12. In the present

case, respondent cites no analogous remarks in the record.

¶ 35 Fifth, under section 3-114.2 of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 3-114.2), "neither age nor length of employment [was] taken into consideration in calculating [Allen's] disability benefits"; rather, his salary was the sole basis for calculating the amount of his disability benefits. *Id.* at 811. The appellate court noted that under section 3-111 (Ill. Rev. Stat. 1989, ch. 108 1/2, ¶ 3-111), longevity pensions, by contrast, depended not only on the police officer's salary before retirement but also on the officer's age and years of service. *Id.* The appellate court reasoned: "The statute is persuasive that the two types of pensions should not be treated identically but should be considered as separate entities, each with its own characteristics." *Id.* at 811-12. In the present case, though, the disability pension and the retirement pension overlap in their characteristics because while Allen's pension was a nonduty-related disability pension, respondent's pension is a line-of-duty disability pension. In the case of a firefighter's line-of-duty disability pension, age and years of service can count, because by statutory law the line-of-duty disability pension has to be at least as great as the retirement pension the firefighter would be eligible to receive:

"[T]he firefighter shall be entitled to a disability pension equal to the greater of (1) 65% of the monthly salary attached to the rank held by him or her in the fire department at the date he or she is removed from the municipality's fire department payroll or (2) the retirement pension that the firefighter would be eligible to receive if he or she retired (but not including any automatic annual increase in that retirement pension)." 40 ILCS 5/4-110 (West

2012).

Because age and length of service count for purposes of a retirement pension (40 ILCS 5/4-109(a) (West 2012)), and because the amount of the line-of-duty disability pension is tied to the amount of the retirement pension the firefighter would be eligible to receive (40 ILCS 5/4-110 (West 2012)), respondent's pension is not truly comparable to Allen's pension in *Belk*.

¶ 36 Sixth, the formula the Belks used in their stipulation was designed to apportion an age- or service-related retirement pension, not a disability pension that the pensioner collected before retiring. *Belk*, 239 Ill. App. 3d at 812. Likewise, we agree that the formula the trial court used in this case is designed for retirement pensions. Nevertheless, the distinction between a line-of-duty disability pension and a retirement pension tends to break down, considering that (1) the statute pegs the amount of the line-of-duty disability pension to the amount of the retirement pension (40 ILCS 5/4-110 (West 2012)), (2) the amount of respondent's line-of-duty disability pension equals the amount of the retirement pension he initially would be eligible to collect, and (3) respondent is collecting the line-of-duty disability pension as an inferior substitute for the retirement pension to which he is entitled—inferior because he is giving up the annual increases that would come with a retirement pension. See *In re Marriage of Marshall*, 166 Ill. App. 3d 954, 962 (1988) ("To allow a technicality, *i.e.*, a disability benefit instead of regular retirement pay, to defeat the terms of the agreement could hardly have been the intention of the parties. We conclude that the dissolution agreement can be reasonably interpreted in only one way—the petitioner was going to be paid the percentage of what would be the normal retirement benefits, whether [the] respondent was paid normal retirement benefits or disability retirement benefits.").

¶ 37 Because of all those distinctions, we find *Belk* to be distinguishable.

¶ 38

B. The Statutory Restriction on
Qualified Illinois Domestic Relations Orders

¶ 39 Respondent argues that sections 1-119(b)(1), (b)(2), and (b)(4) of the Illinois Pension Code (40 ILCS 5/1-119(b)(1), (b)(2), (b)(4) (West 2012)) "do[] not permit apportioning a disability pension to petitioner and that the "Order Regarding Pension Benefits" therefore should not be interpreted as doing so."

¶ 40 Section 1-119 (40 ILCS 5/1-119 (West 2012)) is entitled "Qualified Illinois Domestic Relations Orders" (QILDRO), *i.e.*, "an Illinois court order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of a member's accrued benefits in a retirement system" (40 ILCS 5/1-119(a)(6) (West 2012)). A QILDRO requires a retirement system to divert to an alternate payee all or part of a benefit that the retirement system otherwise would have to pay to someone else—such as the member. 40 ILCS 5/1-119(b)(2) (West 2012). A QILDRO may divert the payment of a retirement benefit, a refund, or a death benefit (40 ILCS 5/1-119(b)(1) (West 2012)), but it may not divert the payment of a disability benefit (40 ILCS 5/1-119(b)(1)(4) (West 2012)).

¶ 41 Where is the QILDRO? The trial court never issued one. Instead, the court ordered respondent to pay petitioner a portion of his disability benefits after he received them from the Champaign Fireman's Pension Fund. Nothing in section 1-119 forbids this triangular arrangement. See *In re Marriage of Roehn*, 216 Ill. App. 3d 891, 895 (1991).

¶ 42

C. The Pension Protection Clause of the Illinois Constitution

¶ 43 Respondent argues that the "Order Regarding Pension Benefits" violates the pension protection clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 5). According to respondent, that clause forbids any division of pension benefits without the

pensioner's consent. See 40 ILCS 5/1-119(m)(1) (West 2012).

¶ 44 The pension protection clause provides as follows:

"Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5.

The purpose of this clause is to make pension benefits a contractual right as opposed to a mere bounty or gratuity that the government may reduce or eliminate at will. *Buddell v. Board of Trustees State University Retirement System of Illinois*, 118 Ill. 2d 99, 102 (1987); *Kraus v. Board of Trustees of Police Pension Fund of Village of Niles*, 72 Ill. App. 3d 833, 848 (1979).

¶ 45 By requiring *respondent* to pay petitioner a portion of the pension benefits the pension board has paid him, the trial court in no way interferes with the contractual relationship between respondent and the pension board. Cf. *id.* at 844 ("Application of that [statutory] amendment to [the] plaintiff would amount to a change in the terms of his contract with the pension system ***."). His pension benefits are not "diminished or impaired." Ill. Const. 1970, art. XIII, § 5. He will continue receiving the full amount of benefits the pension board is contractually obligated to pay him. One hundred percent of those benefits will come under his dominance and control, and he will be able to deposit them in his bank account. It is just that the "Order Regarding Pension Benefits" requires him to then pay petitioner an amount calculated partly on the basis of the amount the pension board, in fulfillment of its contractual obligation, paid to him. Such an order does not violate the pension protection clause. While the pension

protection clause protects respondent from the diminishment or impairment of his pension benefits, it does not protect him from the diminishment or impairment of his finances.

¶ 46

III. CONCLUSION

¶ 47

For the foregoing reasons, we affirm the trial court's judgment.

¶ 48

Affirmed.