2019 IL App (2d) 180617-U
No. 2-18-0617
Order filed October 15, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re the MARRIAGE OF:	)	Appeal from the Circuit Court
THOMAS ENGELHARD,	)	of Du Page County.
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 04-MR-759
	)	
MELISSA ENGELHARD,	)	Honorable
	)	Neal W. Cerne,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly determined that the parties intended to divide one of husband's retirement accounts per the marital settlement agreement even though that account was "non-qualified" under ERISA; however, the court erred in requiring husband to obtain a $250,000 alternative death benefit for former spouse where there was no evidence of the value of the plan's surviving-spouse benefit.

¶ 2 This post-decree appeal presents the question of how to distribute the marital portion of pension benefits from an unfunded "top hat" deferred compensation plan. Top hat plans are unfunded pension plans that primarily provide corporate executives with deferred compensation in excess of Internal Revenue Service ("IRS") limitations. Such plans are also referred to as

"non-qualified plans" because they are exempt from the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. §1051(2)). An ERISA qualified pension plan *must* honor a Qualified Domestic Relations Order ("QDRO"), a state-court order that creates or recognizes the right of an alternate payee (typically a former spouse) to receive a portion of the participant's benefits including surviving-spouse benefits. See 29 U.S.C. §1056(d)(3)(B)(ii). But outside of ERISA's framework, a non-qualified plan may honor a QDRO, or it may not. That is up to the plan. What determines whether the order is "qualified" in this sense is whether the pension plan's administrator accepts it, not the label one attaches to the plan *vis-à-vis* ERISA. See, *e.g.*, *Brown v. Continental Airlines, Inc.*, 647 F.3d 221, 223 (5th Cir. 2011); *Carmona v. Carmona*, 603 F.3d 1041, 1054 (9th Cir. 2010). Accordingly, as we shall see, despite the "alphabet soup world of pension benefits" (*Hamilton v. Washington State Plumbing & Pipefitting Industries Pension Plan*, 433 F.3d 1091, 1093 (9th Cir. 2006)), for our purposes, non-qualified plans are divisible marital assets subject to a QDRO just like any other pension plan.

¶ 3 Thomas and Melissa Engelhard were married in August 1980 and their marriage resulted in three children. Ultimately, Thomas and Melissa were divorced in December 2000. In addition, from December 1984 to June 2007, Thomas was a sales representative and pension consultant for The Hartford Life Insurance Co. (The Hartford). Thus, Thomas was employed by The Hartford during 16 years of the marriage.

¶ 4 A stipulation of Thomas and Melissa's marital settlement agreement (MSA), which was incorporated into the dissolution judgment, stated that the marital portion of Thomas' "retirement benefits through his employer" would be equally divided by the parties. The agreement did not identify the precise name of the plans, but stated that Thomas' retirement benefits "include *** Hartford 401(k) Savings Plan *** Hartford Excess Deferred Compensation Plan [and] Hartford

Pension Plan[.]" The MSA provided that any subject plan would be divided by a QDRO; however, in the event the plan would not accept the order, the court reserved jurisdiction to divide the assets. See *In re Marriage of Richardson*, 381 Ill. App. 3d 47, 52 (2008) (explaining that, so long as it is provided for in the dissolution judgment, Illinois courts follow the reserved-jurisdiction approach when allocating unmatured pension interests). Finally, the agreement stated that Melissa would be named as the surviving spouse on the "Pension Plan."

¶ 5 Shortly after the dissolution judgment was entered, a QDRO was filed with The Hartford and in turn Melissa received a letter from The Hartford's Retirement Plan Manager stating that she would receive $3,100 (we have rounded to the nearest $100) per month when the pension matured. In 2012, however, Melissa was notified by the plans' administrator that the initial calculation she received incorrectly included both qualified and non-qualified plans. As it stood, Melissa would only receive $1,900 per month. The administrator stated that non-qualified plan which Thomas participated in, "The Hartford Excess Pension Plan II – Final Average Pay Plan" (Excess Plan II), was not covered by the original QDRO. The administrator also stated that if an amended QDRO was filed to include the plan, it would be "grandfather[ed]" in as a permissible assignment.

¶ 6 Melissa filed a petition for the entry of an amended QDRO to include the plan, which Thomas opposed. Thomas asserted that Melissa had waived her interest in the plan and was barred by the plan's terms. At an evidentiary hearing, Thomas testified that he only participated in the Excess Plan II for two years during the marriage and that, due to a change in Internal Revenue Service regulations, he was "forced" in June 2012 to begin drawing the full share, or $3,400 per month, from Excess Plan II. Thomas also testified that a provision in the MSA giving

Melissa a one-time payment of $16,900 was a "settlement" for her interest in the Excess Plan II. Melissa testified that the payment was for the marital portion of one Thomas' bonuses.

¶ 7 The trial court found Thomas' testimony unconvincing and ordered that an amended QDRO be entered for the 16-year marital portion of the annuity as well as the survivor benefit under Excess Plan II. The court further ordered that if the plan would not honor the QDRO, Thomas would pay the shortfall ($1,200 monthly) directly to Melissa. In addition, the court ordered that Thomas would maintain a life insurance policy or name her as the beneficiary of his estate or an asset with a death benefit of $250,000. Finally, the court found that, because Thomas had been receiving payments on Melissa's marital portion of Excess Plan II since June 2012, he owed her $84,000 ($1,200 x 70 months). Thomas appeals.

¶ 8 Thomas' primary contention is that by entering a QDRO for Excess Plan II, the trial court improperly modified or reopened the dissolution judgment as opposed to enforcing it. *Cf.* 750 ILCS 5/510(b) (West 2016). When reviewing a trial court's distribution of marital property, we apply the manifest-weight-of-the-evidence standard to the court's factual findings, and we apply the abuse-of-discretion standard when reviewing the overall distribution. *In re Civil Union of Hamlin & Vasconcellos*, 2015 IL App (2d) 140231, ¶ 61 (citing *In re Marriage of Romano,* 2012 IL App (2d) 091339, ¶ 121). The test of proper apportionment of marital property is whether it is equitable, and each case rests on its own facts. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 71. A court abuses its discretion only where no reasonable person would take the view adopted by the trial court. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 52.

¶ 9 In Thomas' view, the fact that the MSA listed some of his "retirement benefits" means that list was comprehensive, encyclopedic, and exhaustive; thus, the MSA's failure to specifically identify "The Hartford Excess Pension Plan II – Final Average Pay Plan" bars

Melissa from ever receiving any funds from it. Thomas also suggests that, to the extent the agreement is ambiguous, that ambiguity should be construed against Melissa.

¶ 10 Like the trial court, we have little trouble rejecting Thomas's cramped interpretation of the MSA. Recognizing, as have courts before us, that marital settlement agreements oftentimes are not models of exemplary draftsmanship (*Blum v. Koster*, 235 Ill. 2d 21, 35 (2009)), we nevertheless must give effect to the plain language of the agreement (*In re Marriage of Kuyk*, 2015 IL App (2d) 140733, ¶ 17; *In re Marriage of Hall*, 404 Ill. App. 3d 160, 166 (2010)). Here, however, that is not a difficult task as we find the language of the parties' agreement was clear and unambiguous.

¶ 11 Contrary to Thomas' suggestion, the MSA identified his "retirement benefits" and "Pension Plan" generically, not specifically. Thomas also fails to address the use of word "include" in the MSA, which indicates that even if specific retirement plans were listed, the list still would not be exhaustive. See *People v. Perry*, 224 Ill. 2d 312, 329 (2007) (rejecting the suggestion that "the term 'includes' * * * is ambiguous because the words 'but is not limited to' are not present"); *Board of Trustees of University of Illinois v. Illinois Education Labor Relations Board*, 2012 IL App (4th) 110836, ¶ 16 (noting that the word include "indicates that what is to follow is only part of a greater whole") (citing Bill Bryson, Bryson's Dictionary of Troublesome Words 105 (2002)); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 132-133 (2012) (stating, "the verb *to include* introduces examples, not an exhaustive list"); H.W. Fowler, *A Dictionary on Modern English Usage* 275 (2d ed. 1965) ("With *include*, there is no presumption * * * that all or even most of the components are mentioned"). Accordingly, we agree with the trial court that the clear intent of the MSA was to allocate the marital portion of *all* of Thomas' retirement benefits from The Hartford, regardless of whether a

given plan was qualified or non-qualified under ERISA. Had the parties intended to distinguish between Thomas' qualified and non-qualified plan benefits, or to exclude Excess Plan II from the division of Thomas' retirement portfolio, they clearly could have said as much.

¶ 12 Although we have determined that the MSA provided for the division and allocation of the marital portion of Excess Plan II, we briefly address some of Thomas' arguments related to this issue. Thomas asserts that Excess Plan II could not be divided because it was an "*unfunded unsecured*" plan. But, as the trial court noted, the fact that Excess Plan II is a non-qualified plan is irrelevant. Both types of plans may be subject to a QDRO, and as in all cases, the QDRO will be effective if and only if the plan accepts the order. See *Brown*, 647 F.3d at 223. We also reject Thomas' reliance on the plan's terms, which state that the plan will not honor any QDRO issued after June 1, 2012. The terms of any plan—including both qualified and non-qualified top-hat plans—are not a right for Thomas to enforce against Melissa, but for Thomas to enforce (potentially) against the plan. "The fund is just a stakeholder, a source of wealth to which the holder of a judgment may turn for satisfaction." *Blue v. UAL Corp.*, 160 F.3d 383, 385 (7th Cir. 1998). A pension trust is not a party to the litigation that produces the QDRO, and may assert defenses to the judgment in its own right. See *id*. And it is precisely because the fund is a distinct legal entity, with its own interests and concerns in litigation, that "many top-hat plan administrators defer to such orders without regard to the plan['s] terms." A. Feuer, *The Effects of Marital Property Rights, Alimony, Child Support, and Domestic Relations Orders on Top-Hat Plans, Excess Benefit Plans, and Bonus Plans,* Compensation Planning Journal, Vol. 38, p. 319 (December 2010). In fact, on the question of whether the plan would honor the order, the pension expert who testified for Thomas even stated that he "could see them going either way on

something like that * * *." In short, whether the plan honors the QDRO is a matter for the plan, not the trial court.

¶ 13 Thomas also asserts that the court could not divide the plan because the plan "*had no determined value*" (emphasis in original) on the date of dissolution. The assertion betrays a misunderstanding about the posture of this case and the division of unmatured investments in general. Although it was Melissa's motion, once the trial court determined that Excess Plan II was marital property, which the court did here before the evidentiary hearing, the burden was on Thomas to demonstrate the amount or percentage of the plan he believed was non-marital. See *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009) ("[t]he party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital"). With the exception of his testimony that he only participated in the plan for two years of the marriage (which the trial court did not credit), Thomas presented no evidence regarding the financial composition of Excess Plan II. That was his decision, so he cannot blame the trial court for making use of the best information it had. See *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33 (explaining doctrine of invited error). Moreover, all pension interests are, by definition, uncertain. "In those instances where it is difficult to place a present value on the pension or profit sharing interest due to uncertainties regarding vesting or maturation, * * * the trial court in its discretion may award each spouse an appropriate percentage of the pension to be paid 'if, as and when' the pension becomes payable." *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663 (1st Dist. 1979). That is precisely what the trial court did here and, under the circumstances, we see no error in the court's decision to divide the pension plan based on the monthly amounts Thomas began to receive when he started to draw on Excess Plan II.

¶ 14 As to *res judicata* and waiver, Thomas first asserts that two orders bar Melissa from attempting to add Excess Plan II to a QDRO. In order for *res judicata* to apply, the same parties must have previously litigated the same issue. *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325, 334 (1996). Here, the parties are the same, but the issues were different. Both post-decree orders that Thomas points to resolved financial and support issues between the parties from 2005 and 2008. The orders state, in the most general terms, that as a result of each order no money is owed between the parties. Neither order purported to address or adjudicate the merits of any claim to any retirement plan, or to Excess Plan II. Finally, to the extent Thomas asserts that Melissa waived or "settled" her claim to Excess Plan II for nearly $17,000, nothing in the record supports his position. We note that at the time of the dissolution judgment, it was stipulated that Thomas owed Melissa the marital portion of a $45,000 bonus he received in 1999, and that he, at the prove-up hearing, stated he would pay Melissa the $17,000 as a "property equalization payment." Nothing shows that the money was for any type of settlement or that Melissa ever disclaimed her interest in Excess Plan II.

¶ 15 We agree with the trial court's assessment that when Thomas, a retirement benefits professional no less, began to draw on Excess Plan II, thereby receiving both the marital and non-marital portion of the fund, he began "using [Melissa's] money." Accordingly, we find that the trial court's division of Excess Plan II was consistent with the court's obligation to enforce the dissolution judgment, and was not a modification.

¶ 16 That said, we agree with Thomas that the trial court abused its discretion when it ordered him to maintain a $250,000 death benefit in the event the plan would not accept the QDRO awarding Melissa surviving spouse benefits. The trial court stated that the purpose of requiring Thomas to create a $250,000 death benefit for Melissa was to give Melissa the surviving spouse

benefit that she would have received from Excess Plan II under the dissolution judgment—*i.e.*, "a property interest [in the plan] that would survive Mr. Engelhard's death." We understand the court's objective, but we question how it arrived at the amount of $250,000.

¶ 17 Contrary to Thomas' suggestion, the value of the surviving-spouse benefit from Excess Plan II is not unknowable; "a survivor's benefit has a determinable value * * * and it is properly considered a marital asset." *In re Marriage of Moore*, 251 Ill. App. 3d 41, 44 (1993). In addition, we acknowledge that there is some authority for ordering a former spouse to maintain a life insurance policy when, after having the opportunity to consider a number of factors, the court finds that the allocation of a surviving spouse benefit is infeasible. See *In re Marriage of Coviello*, 2016 IL App (1st) 141652, ¶ 35. The problem in this case, however, is that the court does not know the overall value of the surviving-spouse benefit for Excess Plan II, and we have no indication of what methodology the trial court used when it selected the amount of $250,000. In other words, that amount could be a windfall, or it could be grossly inadequate compensation. On this record, we simply cannot say. Accordingly, we vacate that portion of the judgment and remand the matter to the trial court for the parties to present evidence regarding the value of the surviving spouse benefit, if necessary, as an alternative to the plan accepting the QDRO.

¶ 18 As we are remanding this matter, we note that at oral argument, Melissa's attorney suggested that it might be more convenient for both parties to allocate the payment for Excess Plan II through one of Thomas' qualified funds. The record is unclear on the potential tax consequences for doing so, but it has been suggested that this method would avoid a "triangular" payment, *i.e.*, from the non-qualified fund to Thomas and from Thomas to Melissa. The suggestion seems reasonable to us, and it is something that the trial court may wish to, in its discretion, consider on remand.

¶ 19 In sum, we affirm in part the judgment of the the Circuit Court of Du Page County, vacate the portion pertaining to the equivalent surviving spouse benefit, and remand for further proceedings.

¶ 20 Affirmed in part; vacated in part; remanded.