FOURTH DIVISION
June 14, 2012

No. 1-10-1101

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
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF MELANIE, WASHINGTON, Petitioner-Appellee, and RICKEY DELL WASHINGTON, Respondent-Appellant.	)	Appeal from the Circuit Court of Cook County.
	)	No. 05 D 4741
	)	The Honorable David Haracz, Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

Held: The settlement agreement reached between petitioner and respondent is not unconscionable. The trial court's ordering of respondent to execute a consent to issuance of a Qualified Illinois Domestic Relations Order, however, violated section 119(m)(1) of the Illinois Pension Code. We therefore affirm in part, reverse in part and remand.

¶ 1 **Procedural History**

¶ 2 Petitioner Melanie Washington, filed a petition for dissolution of marriage on April 29, 2005. Following numerous pretrial conferences, the trial court entered a "supplemental findings, opinion and judgement" awarding the marital home located at 15019 Beachview Terrace, Dolton, Illinois (hereinafter Dolton residence) to respondent, Rickey Dell Washington. At the time of the judgment, the title to the Dolton residence was in both parties' names. The mortgage, however,

was solely in petitioner's name. The following month, petitioner filed a motion for reconsideration due to the discovery of new evidence, citing the initiation of a foreclosure proceeding against the Dolton residence. At the hearing on the motion for reconsideration, upon agreement of both parties, the court directed respondent to quit claim his interest in the Dolton residence as well as make payment to petitioner for back taxes and repairs to the property. Ultimately, respondent agreed to make monthly payments using a Qualified Illinois Domestic Relations Order (hereinafter QILDRO) until the sum of $23,000 was paid. Respondent appeals, arguing that the trial court abused its discretion in dividing the marital property and further erred when it forced him to execute a consent to the issuance of a QILDRO. We affirm in part, reverse in part and remand to the trial court with instruction.

¶ 3 As an initial matter, we note that the record is missing numerous pertinent transcripts, contrary to Supreme Court Rule 341 (eff. July 1, 2008). As a result, our review of this matter is encumbered by the fact that numerous changes to the division of the marital property order occurred without mention in the record.

¶ 4 On February 22, 1993, the parties purchased the Dolton residence. Title to the property was only in petitioner's name, but both parties resided at the address and contributed to its maintenance. In 2001, following what the trial court described as "the irretrievable breakdown of the marriage," both parties moved out of the Dolton residence. Petitioner then began renting out the home, apparently leasing the home three separate times with each lease lasting approximately one year. Petitioner collected all of the rents and made all of the payments on the home during this time period. During this same time period, petitioner also remortgaged the house three

separate times, receiving cash proceeds of approximately $21,000.

¶ 5 In September 2004, in an unexplained turn of events, petitioner quit-claimed the property to herself and respondent. Respondent moved back into the residence and became its sole resident. Although it is not entirely clear from the record, an agreement apparently was made at this time which made respondent solely responsible for the payment of all expenses arising from the Dolton residence. On April 1, 2005, despite the fact that the title to the property was now in both parties' names, petitioner remortgaged the house in her name alone, this time receiving approximately $6,269 in proceeds.

¶ 6 On August, 15, 2008, a hearing was held on the petition for dissolution of marriage. Although not clear from our record, it appears that prior to that date, the parties had largely agreed to the allocation of property, including respondent's desire to have the Dolton residence and petitioner's willingness to give it to him. More specifically, it appears that the only issue which the parties had not agreed on prior to the hearing was whether petitioner should be awarded retirement funds from respondent's annuity and benefit fund. Following the hearing, the trial court entered an order dissolving the parties marriage, and a supplemental judgment awarding the Dolton residence to respondent. The court ordered petitioner to execute a quit-claim deed within 30 days, in order to transfer her entire interest in the Dolton residence. Pursuant to the court's order, respondent was given 150 days after the transfer to refinance the home into his own name; if he failed to do so, the property was to be placed on the market and sold. Respondent was to pay all costs and expenses, including but not limited to mortgage payments and taxes, until sale or refinance. In addition, the supplemental finding recognized that

petitioner's conduct, frequently remortgaging the Dolton residence and liquidating her retirement plans, dissipated the marital estate of approximately $65,799. Accordingly, the supplemental judgment awarded respondent his annuity and benefit fund as his sole and separate property, citing petitioner's dissipation of the marital funds and the additional $54,000 of debt now owed on the Dolton residence because of the remortgages, which was now the responsibility of respondent. Finally, the trial court acknowledged that it was petitioner's dissipation that lead to increases in the monthly mortgage payments to the point that respondent could no longer afford and therefore, had fallen behind on the payments. Despite these findings, the court held that any deficiency judgment resulting from the sale of the property would be the obligation of respondent.

¶ 7 Less than a month later, petitioner filed a motion to reconsider due to "newly discovered evidence," stating that immediately following the entering of the above order, petitioner received notice that foreclosure proceedings had been initiated against the Dolton residence. She argued that based on the court's previous order, respondent would have title solely in his name while the mortgage remained solely in hers, and therefore, the foreclosure proceeding only affected her credit. On November 7, 2008, petitioner filed an amended motion, alleging the same facts but now requesting sole possession of the Dolton residence and payment of the delinquent property taxes by respondent.

¶ 8 An agreed order was entered on March 31, 2009, granting petitioner temporary custody of the home. Although the transcript from this hearing is not included in the record, a later transcript directly addressed those proceedings. According to that transcript, on March 31, 2009,

respondent confirmed that he was no longer living in the Dolton residence, and petitioner expressed her desire to move back into the home. The court, noting that the mortgage to the home was in petitioner's name, allowed her to move back into the home and attempt to refinance the property. Finally, it was established that there was an amount outstanding on the Dolton residence that petitioner sought contribution, alleging that respondent was under a legal responsibility to pay.

¶ 9 On April 13, 2009, the court found that the initial judgment required respondent to make all payments on the Dolton residence, as respondent had said that he wanted the house, would make all payments and would buy her out. The court then continued the case until July 1, 2009, for hearing on petitioners motion to reconsider.

¶ 10 At that hearing, it was revealed that the Dolton residence had substantial water and mold damage. Petitioner claimed that respondent had failed to turn the water off when he moved out of the Dolton residence, resulting in the pipes of the home freezing and breaking during the winter months, which lead to approximately $13,000 of damage to the home. It was further established that there were back taxes on the Dolton residence for the years 2006 and 2007 totaling approximately $10,000. Respondent contended that the property taxes were not his responsibility, as petitioner never followed the initial court order to quit claim her interest in the home to him. The court was unpersuaded by his argument, stating, "So, he thinks he cannot follow the order and not pay anything and allow it to go into foreclosure and not do anything." Respondent argued that he was not living in the home when the water damage occurred because he could not afford the mortgage payments due to petitioners frequent remortgages. He further

argued that the foreclosure proceeding was initiated months before the initial finding was entered which granted him sole custody of the property. The court was again unpersuaded, noting "that wasn't what was represented by his counsel. He was going to live there, pay the mortgage and take over the property." After further argument, respondent conceded to paying the back taxes, however, he repeatedly maintained that he was not responsible for the water damage and mold to the Dolton residence. Ultimately, the court bluntly gave respondent two "options":

> "So, your client has a choice. Order it sold. He pays the deficiency, which is what I would do pursuant to my judgment. Or enter a compromise where she will take over the property and he will give her a sum of money for whatever it is, the taxes and the rehab. That's the choice."

Respondent repeatedly attempted to explain that he should not be held responsible for the deficiency in the event that the property was ordered sold, arguing that the deficiency, which could exceed $100,000, was entirely due to petitioner's repeated refinancing. The trial court remained unswayed, stating that it had already considered petitioner's dissipation of assets and noted that respondent was awarded his entire pension and annuity, which constituted the largest asset in the marital estate.

¶ 11 After a brief discussion with counsel, respondent entered into an "agreement" with the court, "agreeing" to pay the entirety of the outstanding property taxes and half of the exact costs of repairs to the Dolton residence. After further discussion, the parties agreed to a sum of $20,000, which would be used to pay the entirety of the back taxes and the remainder being approximately half of the remediation cost for the water and mold damage. The payment would

be classified as "maintenance on the dissolution" for tax purposes. Aware of respondent's finances and fearing an "enforcement situation," the court suggested respondent make a QDRO[1] (Qualified Domestic Relations Order) payment from his Cook County Pension as it may be the only vehicle available for respondent to make a lump sum payment. The court then stated the terms of the agreement for the record, awarded the Dolton resident to petitioner and ordered respondent to pay petitioner $20,000 by July 30th, 2009, with petitioner responsible for all future payments for mortgage, taxes, utilities and maintenance to the property.

¶ 12 On July 30, 2009, respondent filed a motion for a subsequent "pretrial" conference, although the record does not indicate that any trial was anticipated. Respondent contended that he had been unable to perform under the agreed order due to an inability to access his Cook County Pension funds. While it appears that a hearing was held on September 16, 2009, our record does not contain any transcript. There is, however, a transcript from a subsequent hearing that commented directly on the aforementioned proceedings. According to that transcript, an oral settlement agreement was entered into on September 16, 2009, the terms of which were: (1) respondent was to execute a quit claim deed to petitioner for the Dolton residence; (2) respondent was to execute "federal pension" spousal release documents to petitioner; and (3) respondent was

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[1]The record states "QUADRO," but we assume they were referring to the proper term QDRO.

to sign a consent to issuance of QILDRO[2] in the amount of $23,000.[3]

¶ 13 On September 18, 2009, petitioner stated that respondent had refused to comply with any terms of the settlement agreement that was entered two days earlier. The court then issued a rule to show cause to determine why respondent should not be held in contempt for failing to comply with the terms of the settlement agreement. We note that this order, which purported to merely memorialize the earlier oral agreement in fact includes numerous unexplained changes to the previous order entered on July 7, 2009.

¶ 14 On October 1, 2009, the court entered an order on the petition for rule to show cause, directing respondent to execute a quit claim deed to petitioner for the Dolton residence, execute "federal pension" spousal release documents to petitioner, and sign a consent to the issuance of a QILDRO in the amount of $23,000 prior to October 5, 2009, the next scheduled court date on the matter. The court held that respondent's failure to comply could result in respondent being held in contempt and that his failure to appear could result in a body attachment.

¶ 15 At a hearing after the deadline expired, petitioner presented argument regarding respondent's failure to execute documents that had been agreed to in the settlement conference on September 16, 2009. At this point, in accordance with the settlement agreement, the quit-claim deed and the "federal pension" document had been executed. The lone issue that remained was the signing of the consent to the issuance of a QILDRO. Respondent, citing *In Re Marriage of*

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[2]While some discussion occurs in the record, no formal declaration is made on the record changing the order from a QDRO to a QILDRO.

[3]No mention was given in the record as to why the payment had increased from $20,000 to $23,000.

Menken, 334 Ill. App. 3d 531, 534 (2002), argued that the trial court did not have the authority to order the pension holder to execute a QILDRO consent form. Respondent stated based on the holding in *Menken*, forcing an individual to sign a consent form violates Article 12 Section 5 of the Illinois Constitution. Ill. Const. 1970, Art. XIII, §5. The court bluntly dismissed respondent's assertion, stating that the facts in *Menken* were significantly different, because the QILDRO was part of the settlement agreement in the present case, while in *Menken,* it was part of the judgment, thus obviating any constitutional argument. The court then ordered respondent to sign the consent form, which he did, under protest. An order was entered, holding that the rule to show cause was dismissed. The matter was deemed concluded and removed from the call.

¶ 16 On February 2, 2010, petitioner filed yet another petition for rule to show cause for failing to obey the trial court's order of September 18, 2009, regarding execution of a QILDRO document. The petition alleged that the previous rule to show cause was discharged as respondent executed the consent document and a QILDRO, however, the QILDRO prepared by respondent's attorney was rejected by the Cook County Employees' Annuity & Benefit Fund as improper. Upon rejection, petitioner's attorney prepared another QILDRO, this one in conformity with the regulations of the Cook County Employees Annuity & Benefit Fund. Respondent, however, refused to sign the document.

¶ 17 On February 11, 2010, an order was entered, ordering respondent to show why he should not be held in contempt for failure to execute a QILDRO and consent to issuance. On March 25, 2010, the court ordered respondent to execute consent to issuance of a QILDRO. The order

stated that respondent was to make payments of $900 per month until $23,000 is paid.[4] The order further stated that, "The revision shall be reflected in QILDRO, revised QILDRO shall be submitted to reflect order of today for entry by court. QILDRO to be submitted for entry within 14 days." The record then includes a signed and entered amended QILDRO and consent to issuance of QILDRO.

¶ 18 On April 22, 2010, respondent timely filed his notice of appeal, seeking to have the order of March 25, 2010, and the QILDRO vacated.

Analysis

¶ 19 On appeal, respondent essentially contends that the trial court abused its discretion by ordering him to quit claim the Dolton residence and then pay $23,000 as maintenance in gross to petitioner in the court's division of marital property. Respondent challenges the "trial court's orders", on both July 9, 2009, and September 18, 2009. We find this statement to be puzzling for several reasons. First, our record contains no order entered on July 9, 2009, but rather, contains an order entered on July 7, 2009, in which the court memorialized the settlement agreement entered into on July 1, 2009. In addition, the only order entered by the trial court on September 18, 2009, was related to a rule to show cause. Although that September order purported to recite the details of a previous agreement, the order did not decide any substantive issues concerning the parties' rights. Third, as stated the terms of the parties' agreement as memorialized in those two orders differ. Nonetheless, we believe respondent essentially challenges the propriety of the

[4]Again, no explanation is given in the brief or record on why the maintenance award changed from a lump sum payment to monthly installments.

terms of the approved settlement agreements memorialized in those orders and as a result, we now consider respondent's claim.

¶ 20 Typically, a settlement agreement is not subject to appellate review due to the fact that an agreed order is merely a memorialization of the agreement between the parties rather than a judicial determination of the parties' rights. *In Re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251 (2002) . Nonetheless, this court can set aside a settlement agreement if it is found to be unconscionable. *Id*. An agreement is unconscionable when there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 710 (1996) citing *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 930 (1981). An agreement that merely favors one party over another is not considered unconscionable. *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 181 (1996). In order for an agreement to rise to unconscionability, it must be completely one-sided or oppressive. *Id*. at 182.

¶ 21 Here, we find respondent did not have a "meaningful choice" with respect to his "agreement" to pay petitioner $23,000. The trial court informed respondent that he only had two "options". He could either pay the back taxes and approximately half the repair costs, a sum that was initially established at $20,000 or be responsible for the entire deficiency judgment upon the sale of the Dolton residence. At the time of the trial, it was estimated that if the Dolton residence would be sold there would be a significant deficiency judgment, in excess of $100,000. Facing the prospect of deciding between paying $20,000 or in excess of $100,000, it is clear that he had no meaningful choice but to pay $20,000 on July 1, 2009, notwithstanding that this sum was

ultimately increased to $23,000. Subsequent orders merely memorialized what had already been decided on July 1, 2009. Thus, respondent has satisfied the first step in determining whether the agreement was unconscionable.

¶ 22 We also find, however, that, the settlement terms were not unreasonably favorable to petitioner. To briefly summarize, respondent argues that the order, forcing him to give petitioner $23,000 for taxes and repairs was unconscionable because awarding her the marital residence, alone, would have been sufficient.

¶ 23 While the record does not address why the amount of maintenance in gross was increased from $20,000 to $23,000, the initial finding of July 1, 2009, itemized how the $20,000 payment would be applied. The agreement stated that $10,000 would be used to pay the back taxes on the Dolton residence, the remainder to be applied to the cost of repairs for the water damage. Both the outstanding tax bills and water damage occurred when respondent was the sole tenant of the property. These terms are not oppressive. Furthermore, respondent was awarded his entire pension and annuity, the single largest asset in the marital estate. Thus, we do not find the settlement agreement to be one-sided. Simply put, the settlement agreement does not unreasonably favor one party, and is therefore not unconscionable.

¶ 24 Respondent next contends that the trial court erred when it ordered him to execute a consent to issuance of a QILDRO. Respondent claims that the order forcing him to sign the consent form constitutes an impairment forbidden by the Illinois Constitution of a public pension fund participant's benefits. We agree.

¶ 25 The construction of a statute is a question of law, which is reviewed *de novo*. *People v.*

Nash, 409 Ill. App. 3d 342, 349 (2011). A QILDRO is a statutorily derived instrument, created through a legislative amendment to the Illinois Pension Code (40 ILCS 5/1-101 *et seq*. (West 2004)), allowing domestic relations courts the statutory authority to direct payment of governmental pension benefits to a person other than the regular payee. *In re Marriage of Kehoe and Farkas*, 2012 IL App (1st) 110644 ¶34. While few courts have had the opportunity to analyze the practical implications of this legislative amendment, those that have been presented with this issue recognized an apparent conflict between two sections. Specifically, section 1-119(b)(1) states "An Illinois court of competent jurisdiction in a proceeding for ***dissolution of marriage that provides for the distribution of property *** may order that all or any part of any (i) retirement benefit or (ii) member's refund payable to or on behalf of the member be instead paid by the retirement system to a designated alternate payee." 40 ILCS 5/1-119(b)(1) (West 2004). Nevertheless, the legislature also enacted section 1-119(m)(1), in an apparent effort to protect individuals' rights under Article XIII, Section 5 of the Illinois Constitution, which states, "[m]embership 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. Thus, section 1-119(m)(1) states, "In accordance with Article XIII, Section 5 of the Illinois Constitution *** a QILDRO issued against a member of a retirement system established under an Article of this Code that exempts the payment of benefits or refunds from attachment, garnishment, judgment or other legal process shall not be effective without the written consent of the member if the member began participating in the retirement system on or before the effective

date of this Section." 40 ILCS 5/1-119(m)(1) (West 2004). The effective date of these amendments was July 1, 1999.

¶ 26 Respondent, relying on *In re Marriage of Menken*, 334 Ill. App. 3d 531(2002), maintains that the trial court violated his constitutional rights when it forced him to sign the necessary QILDRO consent form, as he was a member of the pension system prior to 1999, before section 1-119 was enacted. In *Menken*, the trial court awarded the petitioner 60% of the respondent's pension pursuant to a QILDRO. *Id*. at 532. When the respondent refused to sign the QILDRO consent form, the trial court ordered respondent to pay all of the petitioner's attorneys fees. *Id*. The respondent moved to reconsider the award of attorney fees, arguing that the award was punishment for failing to sign the consent form and not based on the proper statutory factors. The court stated its research revealed that there were no cases available as to whether a court could order a participant who had been a member of the pension system prior to 1999 to sign the mandatory consent form. *Id*. Nonetheless, on its own motion, the court ordered respondent to sign the consent form. *Id*. at 532-33. On appeal, the fourth district held that section 1-119(m)(1) was motivated by an intent to protect a pensioner's constitutional rights under article XIII, section 5, of the Illinois Constitution. *Id*. at 534. As a result, the appellate court found that the trial court did not have the authority to order respondent to execute the consent form, reasoning that allowing the trial court to force an individual to sign a consent form against their will would render the consent requirement of section 119(m)(1) meaningless. *Id*. at 535.

¶ 27 Despite the holding in *Menken*, the third district in *Rafferty-Plunkett v. Plunkett*, 392 Ill. App. 3d 100, 106 (2009), carved out a distinction, finding that the trial court's authority to order

the execution of a QILDRO consent form was valid when enforcing a settlement agreement. In a footnote, *Rafferty-Plunkett* distinguished the facts before them from *Menken*, stating that in *Menken* there was no indication that the respondent entered into a voluntary settlement agreement in which he agreed that the petitioner would receive a statutory portion of his pension. *Id*. at 106 n.2. The court found no conflict between section 1-119(m)(1) and an order forcing an individual to execute a consent form when that individual had already freely and voluntarily entered into a settlement agreement order. *Id*. at 106. The court reasoned that the agreement order entered in the trial court, which was incorporated into the judgment for dissolution of marriage, contained nearly all the provisions required by the Pension Code and as such, met the requirements of the written consent called for in the Pension Code and did not violate Article XIII, Section 5 of the Illinois Constitution. *Id*. Therefore, the respondent's consent to payment of his retirement benefits through a QILDRO agreed to in the settlement agreement was considered binding, as would any other provision of the contractual settlement agreement. *Id*. at 107.

¶ 28 We find the facts at hand to be most analogous to *Menken*. Despite the trial court labeling the matter as an "agreed" order, it can be more aptly described as a judgment against respondent. His option was between paying one amount or in the alternative paying a much larger sum. Thus, following the well-reasoned decision in *Menken*, we find that the trial court violated section 119(m)(1) when it forced respondent to sign the consent form.

¶ 29 For the foregoing reasons, we affirm the trial court's order requiring respondent to pay petitioner $23,000 and reverse the trial court's order requiring respondent to execute a consent form to the issuance of a QILDRO. We remand with instructions for the trial court to use the

"triangular approach" to effectuate payment from respondent's pension to petitioner. See *In re Marriage of Roehn*, 216 Ill App. 3d 891, 895 (1991).

¶ 30 Affirmed in part, reversed in part and remanded.