THIRD DIVISION
April 25, 2018

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No. 1-16-2322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GAIL A. DOBBERFUHL, N/K/A GAIL A. MCDONALD,	)	Appeal from the Circuit Court of Cook County
Petitioner-Appellee,	)	No. 1998D18625
v.	)	The Honorable Mary S. Trew, Judge Presiding.
KEITH W. DOBBERFUHL,	)	
Respondent-Appellant.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: In dissolution of marriage proceedings, trial court's entry of a QILDRO affirmed.

¶ 2 Respondent-appellant Keith Dobberfuhl appeals from the circuit court's entry of a Qualified Illinois Domestic Relations Order (QILDRO) and Rule to Show Cause in his

dissolution of marriage proceeding from petitioner Gail Dobberfuhl, n/k/a Gail McDonald. On appeal, Keith contends the trial court erred in its determination that Gail is entitled to a portion of the Keith's firefighter pension death benefits. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in 1977. They have four children, all of whom are now adults. There is no argument on appeal regarding questions of custody or parental rights.

¶ 5 A judgment of dissolution of marriage was entered in May 1999 in Cook County. Both parties were represented by counsel during the dissolution proceedings. A marriage settlement agreement (MSA) was incorporated into the judgment for dissolution. Among other things, the MSA divided the parties' retirement accounts and pension plans. In pertinent part, Article Six (Personal Property), Section C, provides:

> "C. Wife's Interest in Husband's Pension—The Wife and Husband agree that the Wife's interest in the Husband's Fireman's Pension and Pension death benefit, accrued as a result of the Husband's employment by the Village of Maywood, Fire Department, shall be divided equally by Qualified Illinois Domestic Relations Order, hereinafter QILDRO, when the QILDRO Statute takes effect on July 1, 1999, and the Husband agrees to execute any consents necessary to effect this provision of the Marital Settlement Agreement."

¶ 6 While the parties' judgment of dissolution of marriage was entered in May 1999, the effective date of the QILDRO law was July 1, 1999. The parties now explain that, because the law was not yet in effect, attorneys and parties did not at the time know what to expect regarding the outcomes of QILDROs on marital divisions.

¶ 7 Following the parties' dissolution of marriage, Keith remarried, and remains married at this time.

¶ 8 Keith retired from the Village of Maywood Fire Department on April 20, 2010. On July 14, 2011, Gail filed a "Petition for Rule to Show Cause for Failure to Respond to a Properly Served Subpoena" against the Maywood Fire Department Pension Board, seeking to have them respond to a subpoena she issued. Gail later filed two other petitions for rule to show cause against Keith.

¶ 9 Midway through the May 2014 hearing on the three rules to show cause, Gail withdrew the rules to show cause and instead requested time to file a motion to enter a QILDRO.[1] The parties were given a period of time to file motions and proposed QILDROs. Gail filed a petition to enter a QILDRO, including a proposed formula for calculating the alternate payee's (Gail's) award of the marital portion of Keith's benefits under the Maywood Firefighters Pension Fund.

¶ 10 A hearing was held on the petition in August 2015, and Gail orally renewed her rule to show cause against Keith. Gail maintained at that time that she was entitled to 50% of the marital portion of the pension and death benefits as measured from the time of the parties' marriage in 1977 to the time of Keith's retirement in 2010. Keith argued that Gail was entitled to 50% of the martial portion of the pension as measured from the time of the parties' marriage in 1977 to the time of the parties' divorce in 1999. Following the hearing, the trial court entered a memorandum order in which it granted Gail's motion for entry of a QILDRO.[2] The court held, in pertinent part, that Gail was entitled to 50% of the marital portion of the pension and death benefits as

[1] It is unclear from the record what caused the delay between the time Gail filed the first petition for rule to show cause and the hearing, nearly three years later.

[2] The court specified, however, that the QILDRO order "must not be the currently prepared order, but, rather, an order using the Hunt formula, consistent with this court's ruling."

measured from the time of the parties' marriage in 1977 to the time of Keith's retirement in 2010. It described the division in the following manner:

> "[T]his court finds that the parties' marital settlement agreement is silent with respect to a formula for appropriating the pension. As established above, where an agreement does not otherwise provide a method for valuing a pension, a court has discretion to design its own method. The court finds that application of the Hunt formula is appropriate here. The formula involves dividing the number of years or months of marriage during which pension benefits accumulated by the total number of years or months benefits accumulated prior to retirement or being paid. In order to calculate the marital interest, the amount of each benefit payment as it is disbursed is multiplied by the marital interest percentage."

¶ 11 This type of division, as noted *inter alia*, is known as the *Hunt* formula. Keith does not challenge the *Hunt* formula on appeal. Keith does, however, challenge the following paragraph, included in the trial court's memorandum opinion:

> "GAIL maintains that the parties divided the death benefits from KEITH's employment with the Village of Maywood Fire Department and therefore that she is entitled to 50% of those benefits as well. The language in the parties' marital settlement agreement confirms this division. *In re Marriage of Gurley-Dilger & Dilger* presents a case where the husband was denied death benefits from his wife's pension because they were not afforded to him in the parties' judgment for dissolution. Without assignment of these benefits in the judgment, the court found it inappropriate to award him a share of the death benefits of his wife's pension. No. 1-10-1848, 2011 WL 10069558, at 5 (Ill. App. Ct. June 10, 2011). The case at bar presents the opposite set of facts. Here, GAIL

was afforded death benefits in the marital settlement agreement in Article Six, Section C. Accordingly, this Court finds that GAIL is entitled to her portion of the pension death benefits as divided by a QILDRO."

¶ 12 II. ANALYSIS

¶ 13 On appeal, Keith contends the trial court erred, as a matter of law, in its July 2016 memorandum opinion by determining that Gail is entitled to a marital portion of Keith's firefighter death benefit upon Keith's death. Keith does not challenge any other part of the court's ruling, and asks this court to reverse the ruling solely as to death benefits.

¶ 14 As noted above, Gail has not filed a brief in this cause, and we consider this appeal on Keith's brief only, pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). In *Talandis*, our supreme court held that, where the record is simple and the claimed errors are such that the reviewing court can easily decide them without the aid of the appellee's brief, the court should decide the merits of the appeal. *Talandis*, 63 Ill. 2d at 133. However, it is not our role to serve as an advocate for the appellee or search the record for reasons to sustain the trial court's judgment. *Talandis*, 63 Ill. 2d at 133. Thus, where appellant's brief makes a *prima facie* showing of reversible error, and the record supports such contentions of error, we may reverse the trial court. *Talandis*, 63 Ill. 2d at 133.

¶ 15 There is no dispute here that the parties agreed to the division of Keith's pension benefits in the MSA. Therefore, the terms of the MSA are binding on the parties and on the court. See 750 ILCS 5/502(b) (West 2010) ("The terms of the [MSA] agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is

unconscionable"); *In re Marriage of Kehoe*, 2012 IL App (1st) 110644, ¶ 18 (2012). The terms of a marital settlement agreement are interpreted in the same manner as a contract, that is, the court must ascertain the parties' intentions from the language of the contract. *Blum v. Koster*, 235 Ill. 2d 21, 32 (2009). "Like a contract, the marital settlement agreement should be given a fair and reasonable interpretation based upon all of its language and provisions." *In re Marriage of Kehoe*, 2012 IL App (1st) 110644, ¶ 18, citing *In re Marriage of Carrier*, 332 Ill. App. 3d 654, 659 (2002). Keith primarily argues that the pension plan's death benefits should not flow to Gail. Addressing this argument involves the interpretation and application of the Pension Code (40 ILCS 5/1-101 *et seq.*) as well as the interpretation of a marital settlement agreement *de novo*, meaning we perform the same analysis that a trial court would perform and give no deference to the trial court's conclusions or specific rationale. *In re Marriage of Rogers*, 213 Ill. 2d 129, 135-36 (2004) (questions of law are reviewed *de novo*); *Blum*, 235 Ill. 2d at 32 ("The interpretation of a marital settlement agreement is reviewed *de novo* as a question of law"); *In re Marriage of Kehoe*, 2012 IL App (1st) 110644, ¶ 18; *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 16 Any interest in a pension acquired after the marriage and before the judgment of dissolution of marriage or a declaration of invalidity of the marriage is presumed to be marital property within the meaning of section 504 of the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act) (750 ILCS 5/503 (b)(2) (West 2012)). Generally, marital assets should be divided at the time of the dissolution. *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 758 (2003). Pensions, however, are inherently difficult to value. *In re Marriage of Ramsey*, 339 Ill. App. 3d at 758. The amount of benefits actually received are dependent upon future contingencies, such as the length of time actually worked, early retirement, salary earned at the

end of the career, and any changes to the term of the pension plan itself. *In re Marriage of Ramsey*, 339 Ill. App. 3d at 758.

¶ 17 As a way of addressing this difficulty, Illinois courts have adopted methods to divide pensions. Under the total-offset approach, the trial court determines the actual value of the pension, discount it for the risk that the pension will not vest, and discount it again to present value. *In re Marriage of Peters*, 326 Ill. App. 3d 364, 370 (2001). The trial court then awards the pension to the employee spouse, and awards the other party enough marital property to offset the pension award. *In re Marriage of Peters*, 326 Ill. App. 3d at 370. "This approach is best used when there is sufficient actuarial evidence to determine the present value of the pension, when the employee spouse is close to retirement age, and when there is sufficient marital property to allow an offset." *Robinson v. Robinson*, 146 Ill. App. 3d 474, 476 (1986).

¶ 18 The second method is the reserved-jurisdiction method, also known as the *Hunt* formula, in which the trial court reserves jurisdiction to divide the pension and disburse an appropriate percentage to each spouse "if, as and when" the pension becomes available. See *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663 (1979). Under this approach, the marital portion of a pension benefit is calculated by dividing the total years of credited service during the marriage by the total years of credited service (the marital interest percentage) and multiplying this fraction by the monthly benefit. *In re Marriage of Richardson*, 381 Ill. App. 3d 47, 52 (2008) (citing *Hunt*, 78 Ill. App. 3d at 663). "This method is best employed where it is difficult to place a present value on a pension due to uncertainties regarding vesting or maturation." *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 937 (1991).

¶ 19 We are cognizant here that "the terms of the marital settlement agreement are binding on the parties and the court." See *Blum*, 235 Ill. 2d at 32; see also 750 ILCS 5/502(b) (West 2010)

("The terms of the agreement *** are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable"). Additionally, the terms of a marital settlement agreement are interpreted in the same manner as a contract, that is, the court must ascertain the parties' intentions from the language of the contract. *Blum*, 235 Ill. 2d at 32. Here, it is evident from the plain language of the MSA that the parties' intent was for Gail to receive one-half of the marital portion of Keith's vested accrued benefit. The trial court considered how the division should be interpreted, and determined that division under the *Hunt* formula was the "most equitable and reasonable method" of calculating the division under the circumstances of this case.

¶ 20 Keith asks us to evaluate the paragraph wherein the court stated:

> "Here, GAIL was afforded death benefits in the marital settlement agreement in Article Six, Section C. Accordingly, this Court finds that GAIL is entitled to her portion of the pension death benefits as divided by a QILDRO."

He asks us to find that, as a matter of law, the court erred in finding that Gail should receive a marital portion of his pension death benefit.

¶ 21 Initially, Keith claims that this division of death benefits is barred by the doctrine of equitable estoppel because it is an "injustice" where Gail's attorney "clearly advised the Court and Respondent-Appellant that she was no longer seeking Death Benefits," and he relied on that representation to his detriment. Similarly, Keith also claims Gail is barred by the doctrine of waiver from now arguing that she is entitled to Keith's pension death benefits where she "intentionally relinquished any possible known right to Death Benefits." In support of both these

arguments, Keith quotes Gail's attorney's statement at the May 16, 2014 hearing in which counsel said:

"[COUNSEL FOR PETITIONER-APPELLEE GAIL:] First of all, with respect to two important points: Death benefits. They don't apply anymore because I'm sure Mr. Dobberfuhl has received enough of his pension now to where the death benefit reservation is exhausted. So any claim in the QILDRO I presented when I first presented it after I got the correct information from the Maywood Pension Board would be withdrawn. Death benefits are not an issue. No 2 - -

THE COURT: What - - what does that have to do with the Rule to Show Cause? Anything?

[A.] It has to do with the proper QILDRO that would bet entered. And the QILDRO that I handed you had a death benefit provision in it. And I presume you're going to find that to be - -"

THE COURT: What is the issue that's pending before the Court?

[COUNSEL FOR PETITIONER-APPELLEE GAIL:] Say that to me again.

THE COURT: What is the issue that's pending before this Court?

[COUNSEL FOR PETITIONER-APPELLEE GAIL:] Did Mr. -- did Mr. Dobberfuhl comply with the Judgment for Dissolution of Marriage in this enforcement action - -

THE COURT: Well –

[COUNSEL FOR PETITIONER-APPELLEE GAIL:] – by paying what he should have paid?

THE COURT: Was – no. The issue is was he in contempt of court? Was it a willful violation, right?

"[COUNSEL FOR PETITIONER-APPELLEE GAIL:] Was it a willful violation? And that's our – our contention is it was a willful violation, correct.

THE COURT: So what else is pending, if anything?

[COUNSEL FOR PETITIONER-APPELLEE GAIL:] That's it.

THE COURT: Okay. Thank you, counsel."

¶ 22 "Equitable estoppel exists where a party, by his or her own statements or conduct, induces a second party to rely, to his or her detriment, on the statements of conduct of the first party." *Boelkes v. Harlem Consol. School Dist. No. 122*, 363 Ill. App. 3d 551, 557 (2006) (citing *In re Marriage of Smith*, 347 Ill. App. 3d 395, 399 (2004)). "To establish equitable estoppel, the party claiming the estoppel must demonstrate that: (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time he or she made the misrepresentations that they were untrue; (3) the party claiming the estoppel did not know that the misrepresentations were untrue when they were made and when they were acted upon; (4) the other party intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith, to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other party is permitted to deny the truth thereof." *Boelkes*, 363 Ill. App. 3d at 557.

¶ 23 Waiver is the intentional and voluntary relinquishment of a known right by conduct inconsistent with an intent to enforce that right. *In re Nitz*, 317 Ill. App. 3d 119, 130 (2000); *Vaughn v. Speaker*, 126 Ill. 2d 150, 161 (1988). "Waiver may be made by an express agreement or it may be implied from the conduct of the party who is alleged to have waived a right." *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 105 (1991).

¶ 24 Here, Keith has not established either equitable estoppel or waiver. The statement upon which he rests his argument, that is Gail's counsel's statement to the court regarding death

benefits, was not made during the QILDRO hearing. Instead, it was made during a hearing on the three outstanding rules to show cause in May 2014. That hearing, as demonstrated by the above-quoted commentary between the trial court and Gail's attorney, was limited to the rules to show cause. Toward the end of the hearing, the parties went off the record and had a conversation in chambers. Upon emerging from chambers, Gail's counsel announced:

"[COUNSEL FOR PETITIONER-APPELLEE GAIL:] Judge, after a chambers conference, I offered to withdraw the two Petitions for Rule to Show Cause that I had pending against Mr. Dobberfuhl.

THE COURT: Okay.

[COUNSEL FOR PETITIONER-APPELLEE GAIL:] And file a motion styled in the nature of seeking entry of a proper Qualified Domestic Relations Order.

THE COURT: Okay."

¶ 25 Nine months later, in February 2015, Gail filed the petition for entry of a QILDRO. Page two of that motion quoted the parties' judgment for dissolution of marriage regarding Keith's pension and pension death benefit, stating:

"3. That the Parties' Judgment for Dissolution of Marriage provides in relevant part as follows:

ARTICLE SIX

PERSONAL PROPERTY

C. Wife's Interest in Husband's Pension-The Wife and Husband agree that the Wife's interest in the Husband's Fireman's Pension and Pension death benefit, accrued as a result of the Husband's employment by the Village of Maywood, Fire Department, shall be divided equally by Qualified Illinois Domestic Relations Order, hereinafter QILDRO,

> when the QILDRO Statute takes effect on July 1, 1999, and the Husband agrees to execute any consents necessary to effect this provision of the Marital Settlement Agreement."

¶ 26 Here, Keith is unable to show either equitable estoppel or waiver, where the comment in question was made during a hearing that was limited to the issues of the outstanding rules to show cause and not as to the details of the QILDRO. Moreover, Keith is unable to show equitable estoppel where he has not shown that Gail misrepresented or concealed material facts, or that she knew any misrepresentations were untrue. See, *e.g.*, *Boelkes*, 363 Ill. App. 3d at 557 ("To establish equitable estoppel, the party claiming the estoppel must demonstrate that: (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time he or she made the misrepresentations that they were untrue; (3) the party claiming the estoppel did not know that the misrepresentations were untrue when they were made and when they were acted upon; (4) the other party intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith, to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other party is permitted to deny the truth thereof.").

¶ 27 Next, Keith contends that the trial court was wrong, as a matter of law, in its determination that Gail is entitled to a portion of Keith's firefighter pension death benefits. He argues that, although the QILDRO law now provides for distribution of pension death benefits, because there was no provision in the QILDRO as it existed in 1999 that allowed for the distribution of such benefits, and the court should now allow such inclusion.

¶ 28 As noted above, we are cognizant here that "the terms of the marital settlement agreement are binding on the parties and the court." See *Blum*, 235 Ill. 2d at 32; see also 750 ILCS 5/502(b) (West 2010) ("The terms of the agreement *** are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable"). Additionally, the terms of a marital settlement agreement are interpreted in the same manner as a contract, that is, the court must ascertain the parties' intentions from the language of the contract. *Blum*, 235 Ill. 2d at 32. A property settlement between spouses which has been approved by the court and incorporated in the judgment of dissolution becomes merged in the judgment, and the rights of the parties thereafter rest on the judgment. *Rafferty-Plunkett v. Plunkett*¸ 392 Ill. App. 3d 100, 106 (2009). "The law in Illinois is designed to promote the amicable settlement of disputes between parties to a marriage dissolution and unless the agreement is deemed unconscionable, the agreements are binding upon the courts." *Rafferty-Plunkett*, 392 Ill. App. 3d at 106 (citing *In re Marriage of Kloster*, 127 Ill. App. 3d 583, 585-87 (1984).

¶ 29 It is clear from the language of the MSA that the intent of the parties, at the time they entered into the MSA, was to divide Keith's pension as well as pension death benefits in half. Both parties were represented by separate counsel at the time of the MSA and subsequent judgment of dissolution. The dissolution court considered the MSA, noting that the MSA had "been presented to this Court for its examination and approval," and incorporated it into the dissolution judgment. Keith did not challenge the dissolution judgment incorporating the MSA at the time. Now, nearly 19 years later, Keith argues that division of death benefits is not allowable.

¶ 30 Section1-119 of the Pension Code 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 2010). 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 to the member. 40 ILCS 5/1-119(b)(2) (West 2010). This QILDRO law addressed the problem that, prior to July 1, 1999, there was no statutory basis following the dissolution of a marriage for the apportionment of a government pension plan. *Rafferty-Plunkett*, 392 Ill. App. 3d at 101 (citing C. Fain, *Qualified Illinois Domestic Relations Orders: A Retirement System View*, 88 Ill. B.J. 533 (2000)). Another method to distribute retirement benefits is called a "triangular arrangement," whereby a court can order a member party to pay a portion of benefits received to an alternate payee. See, *e.g.*, *In re Marriage of Krane*, 288 Ill. App. 3d 608, 617 (1997).

¶ 31 The record before us neither supports nor disputes Keith's version of the marital division of the pension death benefit. Our review of a cause is wholly dependent upon our review of its pertinent record; the record controls our consideration and binds the parties to a matter's resolution. See Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005); *City of Chicago v. Hutter*, 58 Ill. App. 3d 468, 469 (1978). Our supreme court has repeatedly held that the burden is on the appellant to present a sufficiently complete record of the trial proceedings to support a claim of error on appeal. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *Hutter*, 58 Ill. App. 3d at 469 (it is the duty of the appellant to provide us with a sufficient and complete record, for we may not accept mere assertions contained in an appellate brief or other unverified

pleading in support of a claim of error on appeal). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391.

¶ 32 Without a sufficient record, we cannot resolve the question raised herein. See *Corral*, 217 Ill. 2d at 156. When presented with an insufficient record, we will indulge every reasonable presumption in favor of the judgment appealed from. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006). Accordingly, in the absence of a complete record supporting the appellant's claim of error, any doubts or deficiencies arising from an incomplete record will be construed against the appellant. *Foutch*, 99 Ill. 2d at 391. As the appellant, then, it is Keith's responsibility to provide a complete record on appeal. *Foutch*, 99 Ill. 2d at 391-92.

¶ 33 As noted, this record neither supports nor disputes Keith's version of the marital division of the pension death benefits. For example, we are unable to determine, on this record, what version of a proposed QILDRO the court was reviewing when it made its decision here. In addition, Keith relies heavily on Gail's counsel's comment at the hearing on the rules to show cause that death benefits are not an issue. Keith does not attempt to explain, however, the remainder of counsel's comment, that is, that Keith "has received enough of his pension now to where the death benefit reservation is exhausted." Nor does Keith explain on appeal whether his intent at the time of the dissolution was to divide the marital portion of the death benefits equally (as the MSA appears to reflect) and, if so, why the parties' intent should not control in this context.

¶ 34 Ultimately, considering the record as it appears before us, the single brief on appeal, and the well-reasoned and thoughtful memorandum opinion issued by the trial court, we are not

persuaded that the trial court erred in its decision that Gail is entitled to her portion of the pension death benefits.

¶ 35 III. CONCLUSION

¶ 36 Accordingly, for all of the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.