

2015 IL App (2d) 140748-U
No. 2-14-0748
Order filed April 23, 2015

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

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> THE MARRIAGE OF)	Appeal from the Circuit Court
LORENE A. KOMORITA,)	of McHenry County.
)	
Petitioner-Appellant,)	
)	
and)	No. 09-DV-748
)	
EDWARD JOHN BEST III,)	Honorable
)	Mark R. Gerhardt,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly denied petitioner's motion to vacate an amended QDRO, as the amended QDRO accurately reflected the parties' MSA.
- ¶ 2 Petitioner, Lorene A. Komarita, appeals the trial court's order denying her motion to vacate an amended Qualified Domestic Relations Order (QDRO). She contends that the amended order modified the original judgment under the guise of enforcement without following the amendment procedures specified in the judgment. We affirm.

¶ 3 In April 2005, the trial court dissolved the marriage of petitioner and respondent, Edward John Best III. The dissolution judgment incorporated a marital settlement agreement (MSA), which included the following provision:

“10.1 Husband has a 401(k) account with the Austin Company with a value of approximately \$56,828.00. The value of this account as of April 11, 2005 shall be divided equally between the parties pursuant to a Qualified Domestic Relations Order.”

¶ 4 On May 14, 2013, the trial court entered a QDRO dividing respondent’s interest in an AECOM Technology Corporation Retirement & Savings Plan and awarding petitioner a proportionate share of gains and losses from the plan. (The parties agree that the AECOM plan is the same one referred to in the MSA.)

¶ 5 Respondent moved to vacate or modify the QDRO, arguing that in dividing his retirement plan the parties had specifically intended to exclude subsequent gains and losses. Per the parties’ agreement, the court signed a modified QDRO that was drafted by petitioner’s attorney.

¶ 6 Subsequently, respondent moved to have petitioner held in contempt, alleging that she knowingly retained funds in excess of those contemplated by the dissolution judgment and the amended QDRO. In response, petitioner moved to vacate the amended QDRO in order to have her proportionate share of gains and losses reinstated. Following a hearing, the trial court denied petitioner’s motion, although it did not find her in contempt. Petitioner timely appeals.

¶ 7 Petitioner contends that the trial court erred by denying her motion to enter an amended QDRO giving her a proportionate share of the plan’s subsequent gains and losses. She argues that the division of such a plan is generally deemed to include subsequent gains and losses.

¶ 8 Petitioner acknowledges that the amended QDRO was entered by agreement, but insists that this does not matter for two reasons. First, the QDRO is an enforcement order, and an

enforcement order cannot change the terms of the underlying judgment. Second, the MSA contains specific provisions for amendment, which were not complied with here. We disagree.

¶ 9 The interpretation of an MSA is a question of contract construction, and the court should ascertain and give effect to the parties' intent. *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 242 (2004). The best indication of that intent is the agreement's language. *Id.* Our review is *de novo*. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 166 (2010).

¶ 10 Here, as petitioner acknowledges, the MSA is silent on the question of dividing subsequent gains and losses. However, the agreement specifically provides that the "value of this account as of April 11, 2005 shall be divided equally between the parties." The agreement lists the plan's current value as \$56,828. This is a strong indication that the parties intended to divide the plan's specified value as of April 11, 2005, without including subsequent gains and losses. Thus, the agreed amended QDRO appears to accurately reflect the parties' intent.

¶ 11 We cannot overlook the fact that the amended QDRO was entered by agreement, and indeed was drafted by petitioner's attorney at that time. Normally, "a party may not request the court to proceed in one manner and then argue on appeal that the requested action was error." *People v. Lieksis*, 2012 IL App (2d) 100774, ¶ 24.

¶ 12 Petitioner lists two reasons why that rule should not apply here. However, both are based on the flawed premise that the amended QDRO changed the MSA. Rather, as noted above, the amended QDRO is consistent with the parties' intent to divide the value of the account as of April 11, 2005, and not any subsequent changes in its value.

¶ 13 The cases petitioner cites are clearly distinguishable. In *In re Marriage of David*, 367 Ill. App. 3d 908, 915 (2006), the court stated that "postdissolution gains and losses are simply a by-product of dividing marital assets with a fluctuating value." However, the court noted that the

amended QDRO did not award the wife the dollar value of her assigned share of the husband's pension on the date of dissolution. *Id.* Here, by contrast, the MSA specifically provides that the asset be valued as of April 11, 2005.

¶ 14 In *In re Marriage of Schinelli*, 406 Ill. App. 3d 991 (2011), the court held that, where the account in question had lost substantial value since the date of dissolution, the parties should bear the losses proportionately. *Id.* at 1002. However, the court specifically noted that the parties did not have a settlement agreement dividing their assets. *Id.* at 1003. The court distinguished *In re Marriage of Carrier*, 332 Ill. App. 3d 654 (2002), where the settlement agreement awarded the wife a specific dollar amount.

¶ 15 In *Carrier*, the MSA provided that \$725,000 would be transferred to the wife from the husband's individual retirement account. *Id.* at 655. The court found nothing in the agreement providing that the wife's share "would be impacted by subsequent fluctuations in market value." *Id.* at 658. The present case is more like *Carrier*, in that the MSA provides for a division of the account's specified value as of a particular date.

¶ 16 The judgment of the circuit court of McHenry County is affirmed.

¶ 17 Affirmed.