IN THE COURT OF APPEALS OF IOWA

No. 2-555 / 11-1968
Filed July 25, 2012

IN RE THE MARRIAGE OF
RACHEL MARY BECERRA AND
LENNY DEAN BECERRA

Upon the Petition of
RACHEL MARY BECERRA,
Petitioner-Appellee,

And Concerning
LENNY DEAN BECERRA,
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Lenny Becerra appeals contending the district court erred in extending the time within which Rachel could file and serve a motion to modify or vacate part of the parties' dissolution decree. **APPEAL DISMISSED.**

Aimee L. Lowe of Telpner, Peterson, Smith, Ruesch, Thomas & Simpson, L.L.P., Council Bluffs, for appellant.

Michael J. Winter, Council Bluffs, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Lenny Becerra appeals from a court order entered after the one-year period for filing a motion to vacate, allowing Rachel Becerra additional time within which to file a motion to vacate the stipulated decree. Rachel Becerra has not filed a response to this appeal. Because we lack a final ruling by the district court in this case on relevant matters, and it would not be judicially efficient to issue an opinion on the procedural issues raised by Lenny, we dismiss the appeal.

I. Background Facts and Proceedings.

On July 26, 2010, the district court filed a decree dissolving the marriage of Lenny and Rachel Becerra, which incorporated the parties' stipulation, drafted by Rachel. Paragraph eight of the decree reads:

> Retirement Accounts. That each party shall retain their Principal IRA's. Rachel shall be awarded 50% of the marital portion of Lenny's pension plan with the City of Omaha calculated by the coverture methodology to be distributed between the parties by way of Qualified Domestic Relations Order (QDRO). The preparation of the QDRO shall be conducted by an independent third party who is an expert specializing in the preparation of such documents. Lenny shall be responsible to pay the expenses associated with the preparation . . . .

In accordance with the decree, Lenny had a QDRO prepared. The document was presented for approval to Rachel's trial attorney, and then to two other lawyers, over the ensuing months.

On June 24, 2011, Rachel filed a motion for order nunc pro tunc, asking that the decree be amended to include an award of supplemental pension benefits to Rachel, in addition to the fifty-percent awarded in the decree. The modification of the decree would result in a change to paragraph six of the *proposed* QDRO to strike the word "not" so it would read as follows: "Alternate

Payee shall ~~not~~ be entitled to the proportionate share of any post-retirement benefit increases, ad hoc benefit increases, cost-of-living benefit increases, temporary supplemental benefits or any early retirement subsidy from the Plan."

Lenny resisted, contending the decree does not award Rachel any supplemental pension benefits or increases; no appeal was taken from the decree; and no party had claimed grounds to set aside the decree.

On October 27, 2011, the district court entered an order in which it observed that "[o]rdinarily, a dissolution decree settles all property rights and interest of the parties." *See Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa 1984).[1] And pension benefits are marital property subject to division. *See In re Marriage of Wilson*, 448 N.W.2d 890, 892 (Iowa Ct. App. 1989). The court then noted that the parties' decree

> did not provide for any benefit increases. The proposed [Q]DRO is merely a reflection of the provisions in the decree and there is no "evident mistake" as to warrant a nunc pro tunc order.
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> Here, Rachel is requesting additional benefits that were not in the decree. This proposed action conflicts with, rather than expresses, the court's intended division of the pension. *See In re Marriage of White*, 686 N.W.2d 235 (Iowa Ct. App. 2004). Rachel's application is requesting the court not to state what the Court's actual intentions were, but rather to correct an error of fact or law arriving at its judgment. She appears to be claiming irregularity, mistake or fraud practiced in obtaining the Decree.
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> The appropriate remedy would not be by way of a nunc pro tunc but by way of Petition to Vacate under Rules 1.1012 and 1.1013. This would require a proper petition and payment of filing fees pursuant to those rules. The matter would then have to be set

[1] *But see In re Marriage of Morris*, 810 N.W.2d 880, 886 (Iowa 2012) ("We agree that a property division generally is not modifiable. Iowa Code § 598.21(7) (2011). Nevertheless, the district court retains authority to interpret and enforce its prior decree."); *In re Marriage of Brown*, 776 N.W.2d 644, 648 (Iowa 2009) ("We . . . expressly recognize the ability of a party otherwise entitled to a QDRO to obtain one as an aid to enforcing a previously entered judgment.").

> for an evidentiary trial wherein Rachel would be held to the significant burden of proof set out in Rules 1.1012 and 1.1013.
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> Rachel filed and served the pending Motion for Order Nunc Pro Tunc within the one-year requirement of Rule 1.1013. Rachel shall have until November 10, 2011, to recast her pleadings as a Petition to Vacate and pay the required filing fee upon which this matter can be set for trial. If Rachel does not recast the pleadings and pay the filing fee by November 10, 2011, the Motion for Order Nunc Pro Tunc shall be denied.

The court did not rule on the motion for order nunc pro tunc in its October 27th order.

On November 9, 2011, Rachel filed a petition to modify or vacate the decree.

That same date, November 9, Lenny filed a motion to enlarge, modify or amend the court's October 27 order asserting Rachel did not timely file and serve the petition to vacate, and asked that the court amend its October 27 ruling to deny the motion for order nunc pro tunc. He also asked for an award of $3500 in attorney fees.

On November 28, 2011,[2] Lenny filed a notice of appeal from the October 27 ruling. On December 1, 2011, the district court concluded the pending appeal divested its jurisdiction to rule on the motion to enlarge or modify its October 27 ruling.

II. Scope and Standard of Review.

Our review of this dissolution matter is de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012).

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[2] A notice of appeal must be filed within thirty days. *See* Iowa R. App. P. 6.101(1). The thirtieth day after October 27, 2011, fell on November 26, which was a Saturday. Pursuant to Iowa Code section 4.1(34) (2011), the time for filing was extended to the next day the clerk's office was open to receive the filing, which was Monday, November 28.

III. Discussion.

"Even though neither party has questioned our jurisdiction to hear and decide this case, we will sua sponte dismiss an appeal that is neither authorized by our rules nor permitted by court order." *River Excursions, Inc. v. City of Davenport*, 359 N.W.2d 475, 477 (Iowa 1984). Only a judgment that is final may be appealed as a matter of right. Iowa R. App. P. 6.103(1) ("All final orders and judgments of the district court involving the merits or materially affecting the final decision may be appealed to the supreme court."). "A ruling is not final when the trial court intends to act further on the case before signifying its final adjudication of the issues." *River Excursions*, 359 N.W.2d at 477. The order appealed from here is not a final order as the district court clearly contemplated further action.

Nonetheless, we are to "proceed as though the proper form of review had been requested." Iowa R. App. P. 6.108. Judgments and orders that are not final may be appealed only if permission is granted by the appellate court. Iowa Rs. App. P. 6.103(3), 6.104; *see River Excursions*, 359 N.W.2d at 477. Such permission is "sparingly" granted. *Buechel v. Five Star Quality Care, Inc*., 745 N.W.2d 732, 735 (Iowa 2008). We consider whether the substantial rights of the parties and the interests of judicial efficiency support granting this interlocutory appeal. *See id.* "The main factor in determining whether such an interlocutory appeal should be granted is whether consideration of the issues would serve the "interest of sound and efficient judicial administration." *Id.* at 735–36.

Because the district court has not ruled on Rachel's resisted motion for order nunc pro tunc, nor on her motion to vacate, nor on Lenny's motion to enlarge, the record before us contains no adjudication of the issue whether

supplemental pension benefits were intended by the district court to be divided, or considered by the court in entering its decree. The district court retains authority to interpret and enforce its prior decree, *see Morris*, 810 N.W.2d at 886, and Rachel and Lenny are entitled to a QDRO whether to enforce the decree, or as part of the court's final judgment. *See Brown*, 776 N.W.2d at 648. Because we lack a final ruling by the district court in this case on such matters, and it would not be judicially efficient to issue an opinion on the procedural issues raised by Lenny, we dismiss the appeal.

Appellant's request for appellate attorney fees is denied. Costs on appeal are assessed to Lenny.

APPEAL DISMISSED.