

IN THE COURT OF APPEALS OF IOWA

No. 6-469 / 05-2140
Filed September 21, 2006

**IN RE THE MARRIAGE OF LARRY GENE EILANDER
AND NANCY DIANE EILANDER,**

**Upon the Petition of
LARRY GENE EILANDER,**
Petitioner-Appellee,

And Concerning

NANCY DIANE EILANDER,
Respondent-Appellant,

Appeal from the Iowa District Court for Jasper County, Gary G. Kimes,
Judge.

Nancy Eilander appeals from the district court's order depriving her of an
interest in her ex-spouse's pension benefits. **REVERSED AND REMANDED.**

Lois Vroom, Knoxville, for appellant.

Lee M. Walker of Walker & Billingsley, Newton, for appellee.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

A former spouse appeals an order depriving her of an interest in certain portions of her ex-spouse's pension. We reverse and remand.

I. Background Facts and Proceedings

Larry and Nancy Eilander were married for nineteen years. During the entire marriage, Larry worked for Maytag Corporation. When the parties divorced, they agreed Nancy would receive an interest in Larry's Maytag pension. This agreement was incorporated into the dissolution decree.

Shortly after the decree was entered, the parties agreed additional information concerning the pension should have been included in the decree. An amended decree was entered. It provided that the terms of the pension plan might "change from year to year depending on contract negotiations between the Maytag Company and the union and because of changes in federal law" It also provided that Nancy would receive "an interest in all benefits" to which Larry was entitled. The amended decree specified that it would be treated as a qualified domestic relations order (QDRO) and "neither party shall do any acts which would interfere with or prejudice the other's rights and interests in the benefits of the PLAN."

Approximately ten years after this amended decree was entered, Larry filed a proposed QDRO with the district court which stated that Nancy would not have a right to any increases in benefits under his pension plan. The relevant language is as follows:

Except as provided below, after the alternate payee commences payment, the alternate payee shall have no right to any other increase in the participant's benefit under the Plan caused by

service, earnings, negotiated improvements, post-retirement increases, or Plan amendments occurring subsequent to benefit commencement. Neither shall the alternate payee have any right to the portion of the participant's retirement benefit under the Plan that is not assigned in this Order.

If the participant retires prior to his/her normal retirement date and is eligible to begin receiving subsidized early retirement pension benefits under the Plan, then after the participant retires, the amount of any benefit payment the alternate payee is receiving . . . [w]ill not be increased by a proportionate share of any such early retirement subsidy.

Nancy did not receive notice of this proposed QDRO¹ and no hearing was scheduled. The district court signed the order.

After Nancy learned of the ex parte QDRO, she filed a motion to have it set aside. The district court ruled that, as there was no pending matter, the court lacked jurisdiction to consider the motion.² Nancy then filed a motion to reopen the case, alleging the ex parte QDRO was not consistent with the amended decree. The district court held an unreported or untranscribed hearing on Nancy's motion. Following the hearing, the court entered an order³ framing the issue as follows:

The question before the Court is whether Nancy is entitled to 26.2431% of only the amount of Larry's reduced monthly basic benefit (\$542.79), or whether Nancy is entitled to 26.2431% of the entire benefit available to Larry, which includes both his early

¹ In her motion to set aside the decree, Nancy asserted she did not receive any notice of the QDRO. Larry countered that he sent a copy of the QDRO to the attorney who represented Nancy in the dissolution action. That attorney stated he no longer represented Nancy but unsuccessfully attempted to send the correspondence to her at her last known address. He informed Larry's attorney of these facts.

² The court apparently believed Nancy's motion had not been served on Larry. The motion, however, contains a certificate of service stamp attesting to service on Larry.

³ The operative order was an amended and enlarged order issued after the parties noted mathematical inaccuracies in the original order.

retirement subsidy and supplement (\$2,600.00) until Larry's age 62 and which includes only his early retirement subsidy after age 62.

With respect to the ex parte QDRO, the court found the facts were unclear "as to the notice, if any, that Nancy received." The court acknowledged the QDRO was prepared by Larry's attorney and signed by the court without the specific written approval of Nancy or Nancy's attorney. The court nevertheless affirmed the validity of the QDRO, stating it divided "Larry's pension consistent with the Modified/Amended Order [the amended decree]." The court concluded Nancy was not entitled "to any portion of the supplement or subsidy which Larry receives." Nancy appealed.

II. Analysis

Nancy only challenges the substance of the court's ruling. She contends "the district court erred when it found that Nancy was not entitled to any portion of Larry's early retirement benefits." We agree with her that our review of this issue is for errors of law. *In re Marriage of Marconi*, 584 N.W.2d 331, 334 (Iowa 1998); *Serrano v. Hendricks*, 400 N.W.2d 77, 79 (Iowa Ct. App. 1986).

The amended decree awarded Nancy "an interest in *all benefits*." (emphasis added). The court's ruling from which Nancy appeals divested Nancy of any right to supplemental or subsidy benefits. This ruling is inconsistent with the amended decree. *Cf. Page v. Page*, 817 N.Y.S.2d 551, 552 (2006) (holding provisions of QDRO deviated from the decree); *see also Irato v. Irato*, 732 N.Y.S.2d 213, 213 (2001) (holding QDRO was in error because it deviated from

divorce decree).⁴ In our view, the cited language of the amended decree is plain and unambiguous. See *Serrano*, 400 N.W.2d at 79 (an ambiguity exists when a genuine uncertainty results as to which one of two or more meanings is the proper one). As the amended decree plainly awarded Nancy an interest in all benefits, she is entitled to 26.2431% of all the benefits available to Larry, including any additional benefits resulting from his early retirement.

To the extent the district court relied on the language of the ex parte QDRO in reaching its conclusion that Nancy was not entitled to additional benefits, we note the QDRO language is also inconsistent with the amended decree. Additionally, we believe the QDRO is void and subject to collateral attack because it was issued without notice and an opportunity for Nancy to be heard. *In re S.P.*, 672 N.W.2d 842, 845 (Iowa 2003) (stating we are required to address “lack-of-notice issues because they go ‘to the heart of the district court’s jurisdiction,’” and stating a void judgment is subject to attack at any time and may be vacated at any time); *In re Marriage of Meyer*, 285 N.W.2d 10, 10-11 (Iowa 1979) (“The parties are entitled to notice and an opportunity to resist before changes in the original decree are made.”); *Johnson v. Mitchell*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992) (stating “a departure from established modes of procedure can render a judgment void where the procedural defects are serious

⁴ We also note the court’s ruling was, in substance, an impermissible modification of a property provision of the dissolution decree. *In re Marriage of Knott*, 331 N.W.2d 135, 136 (Iowa 1983) (“a property division is not subject to modification under the authority of the statute in the absence of fraud, duress, coercion, mistake or other grounds as would justify the setting aside or changing a decree in any other case”) (quoting *Knipfer v. Knipfer*, 259 Iowa 347, 356, 144 N.W.2d 140, 145 (1966)).

enough to constitute a violation of due process or to be considered jurisdictional” (citation omitted)).

We reverse and remand for entry of (1) an order granting Nancy her share of all benefits to which Larry is entitled, consistent with this opinion, and (2) a QDRO consistent with the amended decree.

REVERSED AND REMANDED.