IN THE COURT OF APPEALS OF IOWA

No. 8-009 / 06-1846
Filed April 9, 2008

**IN RE THE MARRIAGE OF LAURA LYNNE BECKER
AND FRED HAROLD BECKER**

**Upon the Petition of
LAURA LYNNE BECKER,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
FRED HAROLD BECKER,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Former wife appeals and former husband cross-appeals from the district court's ruling regarding the parties' proposed qualified domestic relations orders. **AFFIRMED.**

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellant.

Daniel L. Bray and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellee.

Heard by Huitink, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Laura Becker appeals and Fred Becker cross-appeals from the district court's ruling regarding the parties' proposed qualified domestic relations orders (QDRO). We affirm the judgment of the district court.

I. Background Facts and Proceedings

Laura and Fred married in 1983. In 2004 Laura petitioned to dissolve the marriage. Following a three-day trial in October 2005, the parties' twenty-two-year marriage was dissolved by a decree entered December 1, 2005.

At the time of the trial, Fred was the sole shareholder of Becker & Becker Stone Co., Inc. He administered and participated in the corporation's 401(k) profit sharing plan during the parties' marriage. The parties agreed prior to trial that the value of Fred's 401(k) plan was $604,028 based upon the 2005 second quarter financial statement for the plan. The district court accepted their valuation in its division of assets and awarded the entire pension plan to Laura. The court awarded the corporation, which it valued at $3,100,000 to Fred and ordered him to pay a $1,203,759 equalization payment to Laura within six months of the decree in order to achieve the court's goal of dividing "the property in a fair and equitable manner." In this case, the court concluded that "a fair distribution is one that is more or less equal."

Fred and Laura each filed post-trial motions pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting the court to enlarge, amend, or modify its dissolution decree. Fred, in relevant part, asserted that his 401(k) plan had increased in value since the entry of the decree and requested the court to award him that increase. The district court entered a ruling on the parties' post-trial

motions in January 2006, denying Fred's request and noting "each party bears the consequences of changes in the value of their assets after the date of the award."[1]

Both parties appealed the dissolution decree. We modified the court's valuation of the corporation, lowering it to $2,664,887, and added $276,887 to the value of assets awarded to Fred. These modifications resulted in an additional $138,443.50 equalizing payment to Laura. Neither party raised the district court's valuation or distribution of the 401(k) plan as an issue on appeal. *See In re Marriage of Becker*, No. 06-0319 (Iowa Ct. App. Nov. 29, 2007).[2]

On February 14, 2006, Fred made a $14,000 salary deferral contribution to a new 401(k) account. In March 2006 he made an additional $21,671.39 profit sharing contribution and a $6300 safe harbor contribution to that account.

In August 2006 Fred filed a "Motion for Hearing Regarding Qualified Domestic Relations Order," asserting Laura was improperly claiming she was entitled to "post valuation gains and to post valuation contributions" to his 401(k) plan. The motion was heard by the court on October 3, 2006. At the hearing, Fred informed the court the actual value of his pension at the time of the trial was $654,919.79, as reflected by the 2005 third-quarter financial statement. He attributed the increase in value to market gain, a $22,000 profit sharing contribution, and a $6000 safe harbor contribution that he made on September 16, 2005, several weeks before the trial in this matter. He requested

[1] The court also decreased Laura's equalization payment to $1,137,759 due to a perceived error in its characterization of one of the parties' other assets.
[2] Our supreme court granted the parties' application for further review of our decision on February 13, 2008.

that the market gain and contributions be divided equally between the parties. He conceded, however, that Laura was entitled to the pension's appreciation in value following the entry of the dissolution decree.[3]

At the QDRO hearing, Laura argued she was entitled to a portion of the 2006 contributions made by Fred, which totaled $41,971.39, because they "represent[ed] deferred income or profit sharing for the calendar year 2005." Fred confirmed the contributions he made to his new pension plan in 2006 were based on "services that [he] performed and provided to the company in calendar year 2005." However, he characterized the contributions as "discretionary" and argued Laura was not entitled to them because "the money that was deposited in those accounts came from the left over funds after the decree and from my profits that I had left over from the calendar year 2005."

The district court entered an order on October 16, 2006, denying Fred's claim that the 2005 third-quarter increase in the pension plan should be divided equally between the parties and denying Laura's claim that she was entitled to the 2006 contributions made by Fred to his new 401(k) account. The court stated its intention in the decree was:

> to award [Laura] the title to the balance of the 401(k) account as it existed at the time of trial. It was not the Court's intention to award her any interest in contributions made by [Fred] after trial or the appreciation of those contributions.

The court accordingly found Fred was "entitled to his post-trial contributions and the earnings of those contributions. Everything else in the account is [Laura's]."

[3] By the end of 2005, the pension had increased to $671,442.05.

Laura appeals, claiming the district court erred in denying her claim to the 2006 contributions because the court "failed to recognize that delayed contributions made to a 401(k) after the date of divorce are marital property subject to distribution when the contributions are made as compensation by an employer for services rendered during the marriage." Laura also requests an award of appellate attorney fees. Fred cross-appeals, claiming the district court should have equally divided the $28,000 in contributions that he made to the pension before the trial and the appreciation in the pension before the entry of the dissolution decree.

II. Scope and Standards of Review

We review rulings regarding proposed QDROs de novo. *In re Marriage of Klein*, 522 N.W.2d 625, 627 (Iowa Ct. App. 1994) (reviewing whether QDRO followed the dissolution decree); *see also In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006) (stating a proceeding to implement a dissolution decree after its entry is tried in equity and reviewed de novo on appeal).

III. Discussion

A. 2005 Market Gain and Contributions

Fred asserts the district court and the parties mistakenly "valued [his] interest in the Plan at $604,028" when it "actually had a value of $654,919.79 as of September 30, 2005 (10 days before trial) and $671,442.05 as of December 31, 2005." He claims he should be awarded one-half of the "$28,000 in contributions and the market appreciation to . . . the Plan occurring from June 30, 2005 (the valuation date utilized by the parties and the court at trial) and December 1, 2005 (the date of the Decree of Dissolution)." In rejecting Fred's

claim, the district court found his "unilateral mistake" in valuing his pension plan at the time of trial "will not support a modification request." We agree.

It is a well-established rule that a property division in a dissolution decree, like any ordinary judgment, cannot be modified or vacated after it has become final in the absence of fraud, coercion, or other grounds on which ordinary judgments may be reviewed, modified, vacated, or set aside. *In re Marriage of Full*, 255 N.W.2d 153, 156 (Iowa 1977); *see also* Iowa R. Civ. P. 1.1012 (setting forth grounds for vacating or modifying judgments). "A primary ground for asserting modification of a property division is through an alleged mutual mistake." *In re Marriage of Prendergast*, 380 N.W.2d 431, 433 (Iowa Ct. App. 1985) (listing cases where mistakes justifying a modification of property division have been found). Modification of a property division due to a mutual mistake may be accomplished through the procedure outlined in Iowa Rule of Civil Procedure 1.1013.[4] *Id*. Because Fred's QDRO motion did not comply with the requirements of rule 1.1013, he now contends on appeal that his "request for a hearing to determine Laura's interest in the Plan was in substance a motion for an order nunc pro tunc" because there was a "clear and undisputed mistake in the valuation of [his] interest in the Plan."

Our courts have jurisdiction to correct their own judgments by nunc pro tunc order. *McVay v. Kenneth E. Montz Implement Co.*, 287 N.W.2d 149, 150 (Iowa 1980). The purpose of such an order is to make the record show truthfully what judgment was actually rendered. *Headley v. Headley*, 172 N.W.2d 104,

[4] Rule 1.1013 requires a party seeking relief under rule 1.1012 to file and serve a petition on the adverse party "in the original action within one year after the entry of the judgment or order involved."

108 (Iowa 1969). "Thus, a court may properly use a *nunc pro tunc* order to correct a clerical error, an error 'that is not the result of judicial reasoning and determination.'" *Weissenburger v. Iowa Dist. Court*, 740 N.W.2d 431, 434 (Iowa 2007) (finding a nunc pro tunc order is inappropriate where "it alters the court's original decision, not simply the record made of the court's original decision"). A nunc pro tunc order can therefore be used only to correct obvious errors or to make an order conform to the judge's original intent. *Graber v. Iowa Dist. Court*, 410 N.W.2d 224, 229 (Iowa 1987).

Whether there was a mistake ultimately depends on judicial intention. *Headley*, 172 N.W.2d at 109. In this case, the judge who entered the order regarding the parties' proposed QDROs was the same judge who entered the dissolution decree. "Interpretation given a decree by the judge who enters the original decree is given weight by this court." *In re Marriage of Bird*, 332 N.W.2d 123, 125 (Iowa Ct. App. 1983). The judge found there was no mistake in his valuation of the pension, stating, "It was the Court's intention to award [Laura] the 401(k) account itself" along with any appreciation in that account between the trial and the decree "and there is no reason to change that result. The Court's 401(k) value was founded in the evidence relied upon for an equitable distribution."

Fred represented at trial, and Laura agreed, that the value of the pension was $604,028. His valuation of the pension was based on the plan's 2005 second-quarter financial statement, which he asserted was the "only statement available to us at the time of trial." However, the court determined, and we agree, that "[p]rior to and during trial [Fred] had access to the correct value." He

was the plan administrator, and he acknowledged at the hearing in this matter that he knew he made $28,000 in contributions to the plan several weeks before the trial.

"It is not the purpose of nunc pro tunc to correct a mistake or misunderstanding of litigants." *Headley*, 172 N.W.2d at 108. Fred's "mistake" in valuing the pension is thus not the type of error justifying modification of the court's property division. *See Prendergast*, 380 N.W.2d at 433 (stating an alleged mistake is not modifiable if it is not raised at the original hearing due to the oversight of one of the parties). We agree with the district court that if Fred disagreed with the court's valuation or distribution of the pension, his remedy was "to challenge the award on appeal." *See In re Marriage of Knott*, 331 N.W.2d 135, 137 (Iowa 1983) ("Inequitable property division in a dissolution decree should be corrected by an appeal. Thereafter, property rights ought to be accorded some permanency."); *see also McVay*, 287 N.W.2d at 151 ("[I]f a court makes an error of fact or law in arriving at its judgment, the appropriate remedy is not by way of a nunc pro tunc order but by other available procedures such as a motion under [rule 1.904(2)] or a motion for new trial. . . ."). We therefore reject this assignment of error.

B. 2006 Contributions

We turn next to Laura's claim that she is entitled to a portion of the $41,971.39 in contributions that Fred made to his 401(k) plan in 2006, after the parties' decree had been entered. She argues these contributions "are marital property subject to distribution" because they were "made as compensation by an employer for services rendered during the marriage."

Before reaching the merits of her claim, we believe it is important to emphasize the limited nature of the issue presented for our review. Neither party has appealed the district court's division of the pension plan. *See In re Marriage of Becker*, No. 06-0319 (Iowa Ct. App. Nov. 29, 2007). Nor has either party filed an application to modify the court's decree. Our resolution of this issue therefore depends upon interpretation of the dissolution decree. *See, e.g.*, *Klein*, 522 N.W.2d at 627-28 (reviewing QDRO entered by court to determine whether it "followed the decree"); *Irato v. Irato*, 732 N.Y.S.2d 213, 213 (N.Y. App. Div. 2001) (holding QDRO in error because it deviated from divorce decree).

In interpreting the decree, the determinative factor guiding our inquiry is the intent of the trial court as gathered from the decree. *Knott*, 331 N.W.2d at 137. As previously stated, we give weight to a trial court's interpretation of its own decree. *Bird*, 332 N.W.2d at 125. The court in this case denied Laura's claim to the 2006 contributions because "[i]t was never the Court's intention to award [Laura] any interest in post-trial 401(k) contributions [Fred] might choose to make." The court stated Laura "was awarded alimony and this was intended to be her only interest in [Fred's] future earnings. She was also awarded about half of the marital assets but she was given no interest in or control over assets awarded to [Fred]." For the following reasons, we find no reason to disagree with the court's interpretation of its own decree.

Under Iowa law, pensions are characterized as marital assets subject to division in dissolution actions just as any other property. *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). "All property of the marriage that exists *at the time of the divorce* . . . is divisible property." *In re Marriage of*

Sullins, 715 N.W.2d 242, 247 (Iowa 2006) (emphasis added). Thus, "[i]t is the net worth of the parties at the time of trial which is relevant in adjusting their property rights." *Klein*, 522 N.W.2d at 628. Our supreme court has stated that "any increase in the pension benefits accrued after a dissolution decree cannot be considered marital property." *Benson*, 545 N.W.2d at 255; *see also Klein*, 522 N.W.2d at 628 ("Pension contributions made as a result of post dissolution employment is property acquired after the dissolution."). This is so because "[a]n increase in pension rights *resulting from contributions made after a decree of dissolution but before retirement* is the result of efforts made after the dissolution" and therefore "should not be included in the allocation of assets of the marital estate." *Klein*, 522 N.W.2d at 628 (emphasis added).

Laura argues the above-stated rule articulated in *Benson* and *Klein* should not apply in this case because the post-dissolution contributions were based on work Fred performed during the parties' marriage.[5] We reject this argument. Fred is the sole shareholder of the corporation, and he is the plan administrator for the company's 401(k) plan. He testified that as such, the contributions he made to his pension plan in 2006 were discretionary. He further testified he "made the contributions out of the funds that [he] had left over at the end of 2005"

[5] Laura also argues that the "trial court's failure to award [her] one-half of the 2005 delayed contributions results in a windfall to Fred because the contributions were used to reduce the value of the corporate asset awarded to Fred." She asserts the value of corporation in the dissolution decree was reduced by $34,757 due to the corporation's "liability for the delayed 2005 [401(k)] payments." Thus, according to Laura, if she is not awarded a portion of the "$41,971.39 delayed 2005 contribution," that amount will "escape equitable distribution entirely and is an undivided windfall to Fred." It does not appear that this argument was presented to or decided by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). We therefore need not and do not address the argument on appeal.

after the division of the parties' assets. We therefore agree with the district court that because Fred's "post-trial contributions were funded with either post-trial income or from the assets he was awarded," Laura "had no interest in these funds before they were contributed to the 401(k) and she acquired none when they were put to that use." *Cf. In re Marriage of Duggan*, 659 N.W.2d 556, 561 (Iowa 2003) (finding cost-of-living adjustments to monthly benefits in a statutory retirement plan should be treated as marital property because the increases flow from the spouse's employment during the marriage and are a result of the joint efforts of the parties).

C. Appellate Attorney Fees

Laura requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *Sullins*, 715 N.W.2d at 255. We award no appellate attorney fees in this case.

IV. Conclusion

Upon our de novo review, we agree with the district court's ruling refusing to modify its unappealed division of the pension plan through the parties' proposed QDROs. We accordingly affirm the judgment of the district court. We deny Laura's claim for appellate attorney fees.

AFFIRMED.