IN THE COURT OF APPEALS OF IOWA

No. 9-1065 / 09-1061
Filed March 10, 2010

IN RE THE MARRIAGE OF DEBRA K. MADSEN
AND RANDALL W. MADSEN

Upon the Petition of
DEBRA K. MADSEN,
Petitioner-Appellee,

And Concerning
RANDALL W. MADSEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Muscatine County, J. Hobart Darbyshire, Judge.

Randall Madsen appeals from the district court's denial of his application for temporary injunction and oral motion for order nunc pro tunc. **REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.**

James W. Affeldt and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, and John Wunder, Muscatine, for appellant.

Thomas G. Reidel, Muscatine, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On September 12, 2007, Debra Madsen filed a petition for dissolution of her marriage to Randall Madsen. After trial, the Honorable J. Hobart Darbyshire filed a carefully reasoned decree on July 25, 2008, dividing the assets of the parties, and concluding "that the parties' assets should be divided more or less equally between them."

One of the parties' assets was Randall's Thrift Savings Plan (TSP),[1] his federal retirement plan accumulated during his work for the United States Department of Agriculture. Based on the parties' stipulated value of the TSP at the time of trial, Judge Darbyshire awarded each party $191,340 from Randall's TSP, consistent with his stated finding that the parties' assets should be divided "more or less equally."

Debra moved to amend or enlarge findings regarding the procedure for dividing the TSP, among other things. Randall agreed with Debra that the plan administrator of the TSP required the issuance of a retirement benefits order to divide it between Randall and Debra. In his response to Debra's motion, Randall requested that the district court specifically refer to the TSP being divided equally between the parties. The district court amended its decree on September 9, 2008, "to divide Randal W. Madsen's Thrift Savings Plan, which is a 401K plan through his employment . . . equally between Randall W. Madsen and Debra K.

[1] Randall's TSP is a defined contribution plan similar to a 401(k) plan for private sector employees.

Madsen" and further ordered that a retirement benefits order be prepared and submitted.

On January 2, 2009, another district court judge filed a retirement benefits order regarding the TSP stating, "Debra K. Madsen . . . is awarded 50% of the value of the Thrift Savings Plan Account of Randall W. Madsen . . . as of July 25, 2008, when the marriage was dissolved." Both Debra and Randall's attorneys signed the proposed order, indicating their approval as to form and content.

TSP sent Randall a letter[2] on February 13, 2009, stating,

> The court order awards $180,884.30 from your TSP account to [Debra]. . . . The order awards 50 percent of your account as of July 25, 2008. . . . As of that date, your account balance was $361,768.59, 50 percent of which is $180,884.30. [Debra's] entitlement will be credited with earnings at the TSP Government Securities Investment Fund . . . rate . . . .

On March 16, 2009, Randall received a letter from TSP reflecting that a court ordered payment of $184,576.49 was made to Debra, leaving an account balance of $43,401.69 as his share. The parties do not dispute that Randall's TSP account lost substantial value between July 2008 and early 2009 due to the general decline in the equity markets during that time period.

On March 17, 2009, Randall filed an application for temporary writ of injunction. Randall sought to stay the implementation of the retirement benefits order. He argued that the district court intended to award each party fifty percent of the TSP's value, and because the TSP had drastically reduced in value between July of 2008 and February of 2009, the retirement benefits order should be stayed until a new order could be submitted awarding Debra fifty percent of

[2] Randall's counsel contends he did not receive a copy of this letter.

the value as of the date of division to avoid the inequitable result that all market losses were taken from his half of the account. The application was assigned to Judge Darbyshire as the trial judge.

At an unreported hearing on the matter before Judge Darbyshire, Randall orally requested that the court enter an order nunc pro tunc amending the retirement benefits order to reflect the court's intent to divide the assets equally. One way of accomplishing that intent would be to revise the retirement benefits order nunc pro tunc to declare that the account be valued as of the date of the actual distribution of the account rather than the date of the decree.

In his written ruling denying Randall's application for temporary injunction and oral request for an order nunc pro tunc, Judge Darbyshire stated that the court used the value of the assets as stipulated to by the parties and that if the assets were to be valued at a different time, the parties should have addressed that issue earlier.[3]

Judge Darbyshire further stated,

> To value assets at the date they are actually distributed rather than the date of trial . . . would cause untold mischief and confusion. . . . The date of the trial, or the date of the Decree, are the only reasonable times to do it.

Randall appeals, arguing the district court erred in declining to enter an order nunc pro tunc correcting the retirement benefits court order to reflect the court's original intent.

[3] Judge Darbyshire's ruling quoted language from another retirement benefits order that was issued on the same date as the retirement benefits order that divided Randall's TSP. This appeal concerns only the latter.

II. Standard of Review

We review this equitable proceeding de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006) (a proceeding to implement a dissolution decree after its entry is tried in equity and reviewed de novo on appeal).

III. Merits

Randall argues the district court erred in declining to enter an order nunc pro tunc to conform the retirement benefits order to the intent of the district court in the original decree and post-trial rulings. "The function of a nunc pro tunc order is not to modify or correct a judgment but to make the record show truthfully what judgment was actually rendered . . . ." *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995) (quotations omitted). "It is not the purpose of nunc pro tunc to correct a mistake or misunderstanding of litigants." *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969). A nunc pro tunc order can be used "only to correct obvious errors or to make an order conform to the judge's original intent." *Freeman*, 541 N.W.2d at 893. The intent of the trial judge is "crucial to the determination of whether a nunc pro tunc order is appropriate to 'correct' a record." *Graber v. Iowa Dist. Ct.*, 410 N.W.2d 224, 229 (Iowa 1987). The passage of time does not preclude a nunc pro tunc order. *Freeman*, 541 N.W.2d at 893.

Judge Darbyshire's rulings in these proceedings establish that his intention was to divide the value of the TSP equally between the parties. His September 9, 2008 order on the motion pursuant to Iowa Rule of Civil Procedure 1.904(2) was explicit that the TSP was to be "divide[d] . . . equally between

Randall W. Madsen and Debra K. Madsen." In the typical dissolution proceeding, there will be some delay between entry of the dissolution decree and entry of the implementing order to be presented to the entity that holds the pension assets. However, courts in a number of jurisdictions have held that, absent express language to the contrary, the party receiving the plan distribution shares in any interim increase or decrease in the value of the account. *See Buchanan v. Buchanan*, 936 So.2d 1084, 1088-89 (Ala. Civ. App. 2005) (awarding wife half of the shares comprising her husband's retirement account, pursuant to an agreement, despite their decrease in value between the time of judgment and the time of distribution because she was equally responsible for the delay in their distribution); *Shorter v. Shorter*, 851 N.E.2d 378, 385-86 (Ind. Ct. App. 2006) (finding even though the divorce decree referred to a specific valuation date for the pension plan, in the absence of express language otherwise, the decree implicitly contemplated that both parties would share equally in gains or losses occurring after the valuation date and before division was accomplished); *Beike v. Beike*, 805 N.E.2d 1265, 1268-69 (Ind. Ct. App. 2004) (holding "absent express language to the contrary, the risks and losses associated with the pension plan should be borne by both parties as their respective interests were allocated by the trial court"); *Austin v. Austin*, 748 A.2d 996, 999 (Me. 2000) (establishing the valuation date of the 401(k) as of the date of distribution rather than the date of the decree to award gains and losses in proportion to the parties' share in the fund); *Taylor v. Taylor*, 653 N.W.2d 524, 527-28 (Wis. Ct. App. 2002) (holding that the wife's thirty-five percent share of the husband's 401k plan as of the date of the divorce was subject to market

gains and losses from that date until the wife received her share).[4] *But see Baker v. Baker*, 564 S.E.2d 164, 166 (Va. Ct. App. 2002) (reversing entry of an order that awarded gains and losses when the dissolution decree provided wife one-half of husband's profit sharing valued as of the date of the agreement). Because the order is simply an enforcement device, *Blaine v. Blaine*, 744 N.W.2d 444, 448 (Neb. 2008), it may be amended nunc pro tunc to conform to the intent of the underlying divorce decree. *See Wilson v. Lilleston*, 290 S.W.3d 795, 800 (Mo. Ct. App. 2009); *Ozment v. Ozment*, 11 P.3d 635, 639-40 (Okla. Civ. App. 2000). We believe that law applies here and supports Randall's request for nunc pro tunc relief from the retirement benefits order.

The district court characterized Randall's motion as a request to change the "valuation date" set forth in the dissolution decree. We respectfully disagree. The decree was silent as to valuation date; it simply provided for an equal division. As the district court itself pointed out, "Nothing was said at the time of hearing on the Rule 1.904 [motion] regarding a date for valuation of the Thrift Savings Plan." Accordingly, the district court's final decree of dissolution simply provided for equal division of the TSP. It would clearly thwart that intent for

[4] Courts have ruled otherwise when one party was responsible for the delay in the division of the retirement plan. *See Blaine v. Blaine*, 744 N.W.2d 444, 450 (Neb. 2008) (noting ex-husband's "inexcusable delay in entering the [order] required by the decree"). *But see id*. at 452-53 (Stephan, J., dissenting). There is no evidence here that Randall was exclusively responsible for the delay in getting the order entered. It appears that part of the delay may have been due to Debra's decision to appeal, and Randall's decision to cross-appeal, the decree of dissolution—appeals that were subsequently dismissed.

Debra to receive over eighty percent of the TSP because of market conditions that were beyond either party's control and due to neither party's fault.[5]

We understand the district court's justifiable concern that valuing assets "at the date they are actually distributed rather than the date of trial (or date of the Decree) would cause untold mischief and confusion." But in this case, the TSP's value was not date-specific in the dissolution decree and did not need to be. Instead, in the final decree each party received half. Because Randall's application for an order nunc pro tunc requested a correction in the retirement benefits order to reflect the court's clear intent in the dissolution decree to give each ex-spouse half of Randall's TSP, not a change of the date of valuation, it should have been granted.

Costs on appeal are assessed equally between the parties.

REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

[5] Even if the decree had provided for Debra to receive half of the TSP's value as of a valuation date (i.e., much as the retirement benefits order provided), there is authority that Debra would still share in subsequent gains or losses in the account. *See Niccum v. Niccum*, 734 N.E.2d 637, 640 (Ind. Ct. App. 2000) ("The valuation date does not act to bar Myra from benefiting from her entitlement to growth or loss in the investment and pension plans attributable to her share. Rather, the valuation date merely provides a mutually agreed upon base amount to which any growth is added or loss is subtracted, and bars Myra from benefiting from any contributions made by John after the valuation date.").