

STATE OF MICHIGAN
COURT OF APPEALS

DONALD LEE KEEBLER,
Plaintiff-Appellee,

UNPUBLISHED
July 21, 2011

v

VICKY ANN KEEBLER,
Defendant-Appellant.

No. 294970
Washtenaw Circuit Court
LC No. 96-004547-DM

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by leave granted three orders entered by the trial court relating to her defined pension benefit through the Michigan Public School Employees Retirement System (MPERS). Defendant argues that she is entitled to entry of a qualified domestic relations order (QDRO) matching plaintiff's original eligible domestic relations order (EDRO).¹ She also requests that we remand the issue of attorney fees to the trial court for further consideration. We vacate all of the trial court's domestic relations orders except for the original EDRO, which we reinstate, and we remand the case to the trial court for further proceedings consistent with this opinion. We decline defendant's invitation to remand the matter of attorney fees to the trial court.

I. FACTS

The parties were married in 1972. Plaintiff began working for General Motors in 1977, and in 1986, defendant began working for the Ann Arbor Public Schools. The parties divorced after 25 years of marriage, and the trial court entered what appears to be a consent judgment of divorce on March 25, 1997. In relevant part, the portion of the judgment addressing retirement benefits provided:

¹ An EDRO is the functional equivalent of a QDRO, except that an EDRO impacts a public entity, in this case the MPERS.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's retirement and Defendant's retirement with their respective employers shall be divided equally by qualified domestic relations orders. Plaintiff's counsel shall prepare the [EDRO] for Defendant's retirement. Defendant's counsel shall prepare the QDRO for Plaintiff's retirement.

Plaintiff duly drafted an EDRO, which was approved by defendant and entered by the trial court on January 7, 1998.² It expressly provided "that this Order be incorporated in the Judgment of Divorce entered on March 25, 1997, and made a part thereof."

Included among the EDRO's provisions was an assignment to plaintiff of 50 percent of defendant's retirement allowance, including any guaranteed automatic annual increases, based on the benefit accrued as of the date of the judgment of divorce. These benefits were to commence any time after defendant became eligible for retirement, and no later than when defendant actually began receiving benefits. The EDRO additionally provided that plaintiff would be designated as the surviving spouse for any pre-retirement survivor benefits. It also granted plaintiff a pro-rata share of any post-retirement cost-of-living benefit increases. Further:

The [plaintiff] shall have the right to elect to receive benefit payments under the Plan at any time beginning when the [defendant] reaches the earliest retirement date as defined in Section 2(d) of the Eligible Domestic Relations Order Act (Public Act 46 of 1991). *If the [defendant] elects to receive a reduced early retirement benefit, the [plaintiff's] benefit shall be reduced by the same early retirement factor.* [Emphasis added.]

The EDRO additionally states:

The parties agree that their mutual intent is to provide the [plaintiff] with a retirement payment that fairly represents what they have agreed to be [plaintiff's] marital share of [defendant's] accrued retirement benefit as defined in Paragraph 5(a).

Rather than having her attorney prepare a QDRO covering plaintiff's retirement, defendant informed her attorney that she would take care of the order personally. However no action was taken until August 30, 2007, when defendant, again represented by counsel, filed a motion for entry of QDRO. The proposed QDRO did not contain provisions for early retirement supplements, survivor benefits, or cost-of-living increases.

Plaintiff objected on grounds of timeliness, but the trial court overruled this objection, ordering plaintiff's counsel to approve all proposed QDROs presented to him unless they were substantively objectionable. The trial court also denied defendant's request for attorney fees, on

² While the EDRO states that it was signed on January 7, 1997, it was actually filed on January 8, 1998.

the grounds that the duty of drafting a QDRO had been expressly assigned to defendant's attorney, and that much of the expense of the current litigation could likely have been avoided if defendant had acted at the same time plaintiff did, ten years earlier.

Defendant presented a QDRO to plaintiff for signature, but plaintiff refused to sign because the proposed QDRO contained language granting survivor benefits, early-retirement benefits and post-retirement cost-of-living adjustments, which plaintiff believed was prohibited by *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999). Defendant then moved for the trial court to enter a QDRO dividing plaintiff's retirement benefits arguing that she was only asking for the same benefits previously granted to plaintiff under the original EDRO. The trial court ultimately determined that, pursuant to *Quade*, defendant could not be awarded the supplemental benefits sought. The trial court further opined that the best solution would be to strike any of those benefits from the original EDRO as well.

The trial court entered three orders on November 7, 2008. The first states that

neither party is entitled to the following benefits from their former spouse's pension or retirement plans: Early retirement supplement, interim supplements, temporary benefits, post-retirement increases, pre-retirement surviving spouse benefit, or post-retirement surviving spouse's benefit.

The trial court then entered a QDRO and an amended EDRO. The amended EDRO differed in two respects from the original one: the amended EDRO does not grant plaintiff a share of automatic annual benefit increases and states that plaintiff shall not receive a share of post-retirement cost-of-living increases. The amended EDRO, consistent with the original EDRO, did not rule out early-retirement supplements, but did not authorize them either. The amended EDRO continued to provide benefits for plaintiff in the event that he survives defendant.

Pursuant to the QDRO, defendant would not receive any early-retirement supplements, post-retirement increases, pre-retirement surviving-spouse benefits, or post-retirement surviving-spouse benefits. Both the QDRO and the amended EDRO allow benefits to begin as soon as the spouse covered by the plan reaches retirement age, whether or not they retire. Also, if either spouse takes early retirement, the other spouse receives his or her share of the retirement benefit, proportionally reduced for the early retirement. However, the amended EDRO still contains survivor benefits in spite of the court's November 7 order, which the QDRO does not.

Six months later, both the QDRO and amended EDRO were superseded by the first amended QDRO and second amended EDRO, entered May 13, 2009. An amended QDRO was required because apparently plaintiff had taken early retirement before the original QDRO was signed. The second amended EDRO contains survivor benefits, but no post-retirement cost-of-living increases. The first amended QDRO contains similar provisions. The first amended QDRO still explicitly rules out early retirement supplements, and the second amended EDRO does not rule them out, but does not authorize them either.

II. DIVISION OF PENSION BENEFITS

This Court reviews a trial court's dispositional ruling "to determine if it was fair and equitable in light of the facts presented." *Quade*, 238 Mich App at 224. The ruling should be

upheld “unless this Court is left with the firm conviction that the division was inequitable.” *Id.* Issues of law are reviewed de novo. *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000).

As an initial matter, we note that although the specific orders from which defendant appealed have been superseded, this case is nonetheless not moot. An issue is moot if it is impossible for this Court to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). Defendant seeks the reinstatement of the original EDRO and a matching QDRO. The second amended EDRO and first amended QDRO do not satisfy this demand. Therefore, it is possible for this Court to fashion a remedy for defendant.

At the time of the judgment of divorce and the first EDRO in this case, the general rule in Michigan was that separate and distinct components of pension plans could be included in a QDRO only if first specifically awarded in a judgment of divorce. *Quade*, 238 Mich App at 224-225, citing *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993).³ Subsequently, this general rule was clarified in *Thornton v Thornton*, 277 Mich App 453; 746 NW2d 627 (2007). In *Thornton*, the judgment of divorce provided that the plaintiff would receive half of the defendant’s pension benefit, and that the terms of the award would be set forth in a QDRO. *Id.* at 457. The QDRO was approved as to form and content by the defendant’s attorney on the same day as the judgment of divorce. *Id.* This Court found “that the parties intended the judgment and the QDRO to be read together as a comprehensive division of the marital estate.” *Id.* Distinguishing *Quade* and *Roth*, this Court held that because the QDRO was read together with the judgment of divorce, it was not necessary for each component of the QDRO to be mentioned in the judgment of divorce. *Id.* at 457-458.

Here, defendant argues that the parties explicitly incorporated plaintiff’s original EDRO into the judgment of divorce, thereby clearly demonstrating the intent for defendant to receive similar rights to plaintiff’s pension. We agree, particularly in light of the specific language in the original EDRO stating “[i]t is intended that this Order be incorporated in the judgment of divorce entered on March 25, 1997, and made a part thereof.” Plaintiff argues that *Thornton* is distinguishable because the QDRO was approved the same day as the judgment of divorce, whereas the original EDRO in this case was executed nearly nine months after the judgment of divorce. We find this to be a distinction without a difference. Any delay is not probative of the question whether the EDRO was intended to be incorporated into the judgment of divorce. Plaintiff’s attorney drafted the EDRO, and defendant approved it. Most importantly, the EDRO explicitly states that it was to be incorporated into the judgment of divorce.

This does not mean, however, that defendant’s proposed QDRO should have been accepted by plaintiff or the trial court. Defendant’s proposed QDRO would have granted her a share of any early-retirement supplements received by plaintiff, whereas the EDRO did not provide plaintiff with any such benefit. Under the original EDRO, plaintiff received pre- and post-retirement survivor benefits, and a share of post-retirement automatic or cost-of-living increases. The only reference to early retirement in the original EDRO reduces plaintiff’s benefit

³ For divorce actions filed on or after September 1, 2006, MCL 552.101(5) modified this rule.

proportionally if defendant decides to take early retirement; it does not allow him to share in any of those other benefits. Accordingly, we vacate all of the trial court's domestic relations orders except the original EDRO, which we reinstate, and remand the case to the trial court for entry of a QDRO with provisions matching the original EDRO.⁴

III. ATTORNEY FEES

Defendant also requests that we require the trial court on remand to address her request for an award of attorney fees. We decline to do so. This Court reviews a trial court's denial of attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

On appeal, defendant cites neither case law nor facts in the record to support her request that the trial court be directed to consider her request for attorney fees. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (internal citations omitted). In addition, "[t]his Court will not search the record for factual support for a party's claim." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009). Where a party fails to properly address the merits of an issue on appeal, this Court considers the issue abandoned. *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009).

Moreover, we see no justification for granting attorney fees in this case at this time. Defendant argues that attorney fees should be awarded because of plaintiff's unreasonable refusal to sign any of her proposed QDROs. Unreasonable conduct by the opposing party that increases the cost of litigation is an appropriate justification for an award of attorney fees. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). However, plaintiff's refusal to approve defendant's proposed QDROs was reasonable, because the proposed orders would have granted defendant unequal rights to plaintiff's early-retirement supplements.

⁴ Although the second amended EDRO and first amended EDRO were not directly placed in issue on appeal, this Court may "enter any judgment or order or grant further or different relief as the case may require[.]" *Killingbeck v Killingbeck*, 269 Mich App 132, 144 n 3; 711 NW2d 759 (2005), quoting MCR 7.216(A)(7). Any resolution of this case requires vacating at least one of those two orders, because they differ from each other in ways that violate the requirement in the judgment of divorce of an equal division of pension benefits.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause