

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

JIMMY GOSE, ) C/ A NO. 03A01-9506-CH-0268  
 )  
Plaintiff - Appellee, ) BLOUNT CHANCERY  
 )  
v. ) HON. W DALE YOUNG,  
 ) JUDGE  
DELORSE GOSE, )  
 ) AFFIRMED AND  
Defendant - Appellant. ) REMANDED

**FILED**

**March 24, 1997**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

WILLIAM A. MYNATT, JR., SHEPPEARD & SWANSON, P. L. C.,  
Knoxville, for Plaintiff - Appellee.

CHARLES M. CLIFFORD, Maryville, for Defendant - Appellant.

O P I N I O N

Franks. J.

The dispute in this case arises from the parties' divorce decree entered on October 6, 1987. Delorse Gose raises the following issues on appeal:

Whether it was error for the Trial Court to deny any modification under Rule 60.02(5) of the Rules of Civil Procedure of an admittedly erroneous qualified domestic relations order (QDRO) more than one year after its entry.

Whether the QDRO as entered by the Trial Court was void as an impermissible modification of the final decree of divorce entered some five years

previously.

Whether it was error for the Trial Court to deny the appellant any direct relief against the appellee for payment of her share of pension benefits he had already received.

The divorce decree incorporated the parties' property settlement announced in court by the attorneys for the parties. The pertinent statement made by Jimmy Gose's attorney is as follows:

It is further agreed that Ms. Gose shall be awarded a pro-rata amount of Mr. Gose's retirement, which is one-half of its present value . . . it would be \$383.04.

On August 21, 1992, the attorney for Delorse Gose filed a motion for a qualified domestic relations order. The motion recited that Delorse Gose was awarded a 50% interest in Jimmy Gose's pension plan with the Aluminum Company of America and continued that it is necessary that a qualified domestic relations order be entered in order to give effect to said award. On September 30, 1992, a QDRO was signed by the Trial Judge, which had been approved for entry by the attorneys for the parties. As pertinent here, that order provided that Delorse Gose was awarded a 50% interest as of September 17, 1987, in Jimmy Gose's employees' retirement plan with Aluminum Company of America. And further Delorse Gose was to receive the applicable pension benefits commencing on Jimmy Gose's 65th birthday and terminating upon his death.

On February 18, 1994, Delorse Gose filed a motion under Rule 60.02 T.R.C.P., asking that the qualified domestic relations order be set aside and that the Court enter orders as are necessary to give effect to the terms of the final decree . . . in and to Mr. Gose's retirement benefits. The

motion further recited that Jimmy Gose had retired in July of 1992, and was receiving retirement benefits, and that the order was entered on the "mistaken belief" that the payments to Jimmy Gose did not commence until age 65.

In support of the motion, Delorse Gose's attorney filed an affidavit wherein he stated that before the QDRO was entered, he had obtained a copy of the "ALCOA guidelines for qualified domestic relations order" which was furnished him by ALCOA's legal department. Also, that Jimmy Gose's attorney did not inform him that Gose was already receiving monthly benefits.

The Trial Court conducted an evidentiary hearing, and the parties and attorneys testified. At the conclusion, the Trial Judge said:

[t]he final decree in this case is silent as to when M. Gose will pay M. Gose the retirement that was adjudicated in his favor [sic]. It's not even hinted at, it's silent. But a subsequent order entered pursuant to the agreement of the parties doesn't dispute the phraseology of the final decree, it awards a fifty percent interest but it goes further and it specifies that M. Gose will receive the applicable pension benefit commencing on the plaintiffs sixty-fifth birthday. That's what these parties agreed to. That's what they represented to me was their agreement and their lawyers approved the order for entry and based on that representation the Court entered that order.

The Trial Judge refused to grant relief pursuant to the Rule 60 motion and subsequently overruled a "motion to enforce final decree" filed by Delorse Gose.

Appellant argues that the Trial Judge should have granted relief under Rule 60.02(5) T.R.C.P., because the attorney for Jimmy Gose conceded there was error. However, the concession was made in context that there was no

misrepresentation and no fraud, but the mistake was made by her attorney in drafting the QDRO.

The ALCOA guidelines furnished by ALCOA to appellant's attorney prior to the entry of the QDRO, indicate the retirement age was 65, but also notes that the "alternate payee" may elect to receive benefits at the employee's earliest retirement date. The information available to the appellant at the time the QDRO order was entered, put her on notice that other options were available to her. Moreover, there is evidence in the record that she knew or should have known that appellee was retiring early, but she did not provide for that option in the QDRO. The record does not establish a basis to grant Rule 60.02(5) relief. *See NCNB National Bank v. Thrailkill*, 856 S.W2d 150 (Tenn. App. 1993).

Next, it is argued that the QDRO is void because it was entered more than 30 days after the final decree and modified the final decree. We cannot agree. We hold that it was not necessary to enter the QDRO at the time of the entry of the divorce decree or within 30 days thereafter, and adopt the rationale of the Maryland Court of Appeals in *Rohrbeck v. Rohrbeck*, 318 Md. 28, 566 A.2d 767, (1989):

Because of the different circumstances in which a QDRO may prove necessary, it is not essential that such an order be part of the judgment in the action. For one thing, the Federal law does not require that a QDRO be part of the actual judgment in the case. It defines a domestic relations order as including "any judgment . . . or order . . ." That meets the other requirements for such an order. Plan administrators are presumably not interested in receiving multi-faceted divorce decrees specifying such matters as custody, visitations, support, and the like. Their only interest is in those matters set forth in 29 U.S.C. §1056(d)(3) and 26 U.S.C. §414(p), *supra*.

From the point of view of State law, where a QDRO is needed to enforce an earlier entered support order, it obviously cannot be part of the underlying judgment. Even when the QDRO is required to effectuate a disposition . . . there may be circumstances where the need for the order may not be apparent at the time the judgment is entered or where an order entered as part of a judgment has to be modified later because some deficiency in it precludes it from being accepted as a QDRO. We therefore expressly recognize the ability of a party otherwise entitled to a QDRO to obtain one as an aid to enforcing a previously entered judgment.

In this case, the divorce decree as to pension benefits, could not have been enforced without the QDRO, and the QDRO was necessary as an aid to enforcing the previously entered judgment. The QDRO and the divorce decree are not in conflict, and the QDRO is a valid, enforceable order.

Finally, it is argued that appellant should be allowed to proceed directly against appellee as a matter of equity to collect her benefits. This argument is essentially a recharacterization of the relief sought under Rule 60.02(5) which the Trial Court found to be without merit. The benefit sought under this argument was not provided in the final judgment or the QDRO and is, in effect, a collateral attack upon a final judgment. Neither the pleadings nor the evidence in this record establish a basis to grant collateral relief from the final judgment entered in this cause.

Accordingly, the judgment of the Trial Court is affirmed and the cause remanded at appellant's cost.

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Herschel P. Franks, J.

CONCUR:

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Houston M Goddard, P. J.

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Don T. Mc Murray, J.