STATE OF MICHIGAN
Supreme Court
* * * * * * *

Richard William Dorko
Appellant - Plaintiff,

Supreme Court: 156557
Court of Appeals: 333880
Kalamazoo Circuit: 2004-5765-DM

vs.

Sherry Sue Dorko
Appellee - Defendant.

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on behalf of the Amicus Curiae of the
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AMICUS CURIAE BRIEF OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Council ("The Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 3,400 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Family Law Council.

The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The instant case involves the enforcement and implementation of orders relating to property rights incident to a divorce. The Family Law Section presents its position on the issues as requested by this Court in its June 20, 2018 Order granting leave to appeal.

STATEMENT OF FACTS

Amicus curiae is not providing a separate statement of facts and relies on the facts and procedure as set out in the Court of Appeals' Opinion and the parties' respective briefs.

ARGUMENT

I. When a claim for retirement benefits under a Judgment of Divorce accrues. (Michigan Supreme Court Question 3).

Short Answer: Entry of an order and enforcement of an order are separate concepts. Entry of an Order cannot be barred by application of a Statute of Limitations because statutes of limitations pertain to enforcement of an obligation in an order, not entry of the order. The method of entry of a QDRO (and all other orders) is pursuant to MCR 2.602. The Statute of Limitations applies to a claim for retirement assets under a Judgment of Divorce or Qualified Domestic Relations Order, and said right accrues when an alternate payee could receive the benefit/funds awarded in the Judgment, irrespective of when a QDRO is entered. There are many types of retirement plans, with varying dates when an alternate payee would be eligible to receive the benefit/funds awarded to him/her. A blanket rule that sets an accrual date based upon the date of entry of a Judgment or QDRO, as opposed to the date when the benefit/funds would become available to the alternate payee, is inappropriate.

* * * * *

A. Entry of an Order cannot be barred by application of a Statute of Limitations because statutes of limitations pertain to enforcement of an obligation in an order, not entry of the order.

The Court of Appeals' opinion in this matter centers on whether MCL 600.5809 precludes entry of a Qualified Domestic Relations Order[1] submitted more than ten years after entry of a Judgment, as opposed to whether the statute of limitations precludes enforcement of an accrued right established in a judgment or QDRO. This focus is misplaced in that it ignores that MCR 2.602(B) governs the procedures of how judgments and orders are to be entered. To the extent MCL 600.5809 could be interpreted in a manner contrary to the procedures detailed in MCR 2.602(B), "[i]n

[1] For ease of reading, throughout this brief "QDRO" will be used to refer to Qualified Domestic Relations Orders as well as Eligible Domestic Relations Orders and any other form of domestic relations orders relating to the distribution of retirement assets.

resolving the conflict, the court rule prevails because it governs practice and procedure." *Wolf v Mahar*, 308 Mich App 120, 129; 862 NW2d 668, 673 (2014).

MCR 2.602(B) contains four methods of entering orders.[2] Two of the four methods in MCR 2.602(B) contain a time-bar for entry of orders, those being subpart (B)(1) which requires the written order to be submitted at the time the court grants relief, and the Seven Day Rule in subpart (B)(3). To the extent more than seven days have passed since the court's original proclamation of its judgment or order and the parties are not otherwise agreeable to its entry, the only procedure for entry available is that of MCR 2.602(B)(4). Said rule provides "A party may prepare a proposed judgment or order and notice it for settlement before the court."

There is no time limitation included in subpart (B)(4). "We may not read into an unambiguous court rule a provision not included by the Supreme Court." *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92, 103 (2010), referencing *People v Orr,* 275 Mich App 587, 595; 739 NW2d 385, 391 (2007). As such, it would be an interpretive error to overlay any statute of limitations onto MCR 2.602, as doing so would be adding a limitation not otherwise included in the plain language of the court rule or required by law.

[2] Subpart (B)(1) applies to orders submitted contemporaneous with the written judgment or oral ruling. Subpart (B)(2) applies to orders entered by consent. Subpart (B)(3) is the Seven Day Rule utilized by Appellee. Subpart (B)(4) permits a party to "prepare a proposed judgment or order and notice it for settlement before the court."

B. *The Statute of Limitations applies to a claim for retirement assets under a Judgment of Divorce or Qualified Domestic Relations Order, and said right accrues when an alternate payee could receive the benefit/funds awarded in the Judgment, irrespective of when a QDRO is entered.*

"Statutes of limitations are contained in Chapter 58 of the Revised Judicature Act, MCL 600.5801 et seq." *O'Leary v O'Leary,* 321 Mich App 647, 652; 909 NW2d 518, 520–21 (2017). Under the doctrine of *in pari materia*, "statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law." *People v Mazur,* 497 Mich 302, 313; 872 NW2d 201, 206 (2015). As such, when answering the query as to when a claim for retirement benefits under a judgment of divorce begins to accrue, the language in MCL 600.5809(3) must be read in conjunction with the language of the act as a whole so as to avoid inconsistencies within the Act.

MCL 600.5809(1) provides:

> A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, *after the claim first accrued to the person* or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.
>
> MCL 600.5809(1), *emphasis added*.

MCL 600.5809(3) provides:

> Except as provided in subsection (4), *the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record of this state*, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment or decree. The period of limitations is 6 years for an action founded upon a judgment or decree rendered in a court not of record of this state, or of another state, from the time of the rendition of the judgment or decree. […]
>
> MCL 600.5809(3), *emphasis added*.

And MCL 600.5827 (titled "accrual of claim") provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838,1 and in cases not covered by these sections **the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.**
>
> MCL 600.5827*, emphasis added.*

The Court of Appeals in *O'Leary v* O'Leary, 321 Mich App 647 (2017), addressed the interpretation of MCL 600.5809(3) in light of MCL 600.5809(1) and MCL 600.5827. In *O'Leary,* the plaintiff was attempting to enforce a provision within a 2003 Judgment of Divorce which provided that the parties would continue to own the former marital residence as tenants in common, that the home would be continuously offered for sale until sold, and that the indebtedness or profit from the sale would be shared equally when the defendant moved from the home or the home was sold. The defendant in *O'Leary* moved in September 2007, and the home was sold in October 2009 resulting in a deficiency that the plaintiff paid. In May 2015, the plaintiff petitioned the court to enforce the terms of the judgment, requesting that the court require defendant to reimburse plaintiff for her share of the liability. The defendant claimed that MCL 600.5809(3) barred the plaintiff's motion, arguing that the claim accrued at the time of entry of the judgment in 2003. The court held:

> While MCL 600.5809(3) indicates that the limitations period is 10 years "from the time of the rendition of the judgment," MCL 600.5809(1) makes plain that a person cannot bring a claim to enforce an noncontractual money obligation until after the claim accrues. There is potentially some tension between these provisions; but, when they are read together, it is apparent that until the claim accrues as specified in MCL

> 600.5809(1), there is no "action founded upon a judgment or decree" within the meaning of MCL 600.5809(3). Thus the limitations period in MCL 600.5809(3) cannot begin to run until the claim accrues. **In other words, when a judgment provides for payment at some future point, the period of limitations under MCL 600.5809(3), when read in conjunction with MCL 600.5809(1), begins to run when the payment required by the judgment comes due.** See *Rybinski v. Rybinski*, 333 Mich. 592, 596, 53 N.W.2d 386 (1952). Likewise, it was not necessary for plaintiff to seek a renewed judgment under MCL 600.5809(3), because, as we have discussed, until the home sold in 2009, there was no money owing to plaintiff, the period of limitations had not begun to run, and there was no reason to renew the judgment. Defendant's arguments are without merit.
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> *O'Leary v O'Leary*, 321 Mich App 647, 655; 909 NW2d 518, 522 (2017), *emphasis added.*

An award of retirement assets that cannot be paid until some point in the future is similar to the factual framework in *O'Leary.* Having a bright-line blanket 10-year limitations rule would require courts to ignore not only the accrual language of MCL 600.5827, but to ignore the specific language of the particular judgment that the claim is founded upon. This is especially apparent in divorce actions. *O'Leary* provides a prime example of the unique nature of divorce judgments, which often provide family-specific terms conditioned on future events.

As discussed in §II of this brief, *infra,* the preparation and qualification of QDROs can be an arduous process that requires judicial insight to resolve issues that may not be resolved solely by review of the four-corners of a divorce judgment. There are many types of retirement plans, with varying dates when an alternate payee would be eligible to receive the benefit/funds awarded to him/her. In some cases, such as those involving defined contribution plans where the funds are immediately obtainable by the recipient

spouse, the limitations period could begin to accrue at the time the judgment is entered. In other cases, such as those involving defined benefit/pension plans where neither the participant nor the recipient spouse are eligible per Plan rules to receive any portion of the asset until a certain triggering event occurs in the future, the limitations period would not accrue until such time as the triggering event were to occur and the recipient's payments from the plan become payable to him/her.

Applying the logic and interpretation found in *O'Leary* to claims for retirement benefits incident to a divorce is reasonable and appropriate in that it invites a case-by-case determination of when a particular right accrues in light of the language of a judgment and the retirement plan at issue, while adhering to the plain language of the Act and preserving the court's discretion to interpret and enforce its judgments.. There can be no bright-line blanket rule specifying that all claims for retirement benefits under a judgment of divorce accrue upon entry of the judgment without ignoring the accrual language of MCL 600.5827, the specifics of the retirement plans at issue, and the language within the divorce judgments addressing them.

[Section II begins on following page]

II. Whether Joughin v Joughin, 320 Mich App 380 (2017) was correctly decided. (Michigan Supreme Court Question 2).

Short Answer: The outcome of *Joughin* was correct. However, a part of the reasoning for the outcome is based upon a false premise that entry of a QDRO is a ministerial task. Entry of a QDRO is a judicial action which, absent agreement of the parties otherwise, requires decision making. Ministerial tasks are actions taken to effectuate existing obligations without exercising any discretion or independent judgment. The obligation to pay is set forth in the Judgment. A QDRO is one method of payment to effectuate the obligation in the Judgment, and provides additional details as to specific rights and obligations related to retirement assets that are not otherwise included in the Judgment. By comparison, an example of a ministerial task is the mailing of a QDRO to a Plan Administrator following entry.

* * * * *

The court in *Joughin* correctly held that "entry of the proposed QDRO is not an action to enforce a noncontractual money obligation. . . because a QDRO is *part* of the judgment, it necessarily cannot be viewed as *enforcing* the same judgment." *Joughin*, at 387. However, *Joughin* incorrectly reasoned that entry of a QDRO is "nothing more, nothing less" than a party "engaged in supplying documents and information to the court to comply with its ministerial obligations under the judgment[.]" *Joughin*, 320 Mich App at 388. Despite the incorrect reasoning, discussed below, the result in *Joughin* should not be disturbed. *People v Brownridge,* 459 Mich 456, 462, 591 NW2d 26 (1999) ("the trial court nevertheless reached the right result for the wrong reason"); *Parks v Niemiec*, ___ Mich App ___, slip op at 2 (Docket No. 337823, Sept. 18, 2018).

"An act is ministerial in nature if it is "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243, 253 (2006); *Iron Co Bd of Sup'rs v City of Crystal Falls*, 23 Mich App 319, 322; 178 NW2d 527, 529

(1970); *Solo v City of Detroit,* 303 Mich 672, 676–77; 7 NW2d 103, 105 (1942). An example of an act which is devoid of discretion is "issuing a certificate and executing a deed […] necessary only to evidence the title." *Youngs v Povey*, 127 Mich 297, 299; 86 NW 809, 810 (1901). A second example of a ministerial act would be issuing a check to satisfy a settlement. *See Vied v Ford Motor Company*, Unpublished Per Curiam Opinion of the Court of Appeals, Docket 321478 (Sept. 2015).

Conversely, entry of a QDRO is not a simple, ministerial act. The language of a QDRO is to reflect the terms of the Judgment of Divorce and the requirements of MCL 552.101(4) (which ensures a proportionate allocation of collateral benefits).[3] However, a QDRO must also meet the requirements of the plan administrator. *See* 26 USC §414(p)(3) and 29 USC §1056(d)(3)(D) (domestic relations orders cannot require a plan to provide any type of benefit, form of benefit, or other option not otherwise provided for in the plan). While 26 USC §414(p)(2) and 29 USC §1056(d) provide minimum requirements for QDROs, the code does not otherwise limit the plan administrator's discretion in determining plan procedures.[4] As such, plan administrators have wide

[3] "For any divorce or separate maintenance action filed on or after September 1, 2006, if a judgment of divorce or judgment of separate maintenance provides for the assignment of any rights in and to any pension, annuity, or retirement benefits, **a proportionate share of all components of the pension, annuity, or retirement benefits shall be included in the assignment unless the judgment of divorce or judgment of separate maintenance expressly excludes 1 or more components.** Components include, but are not limited to, supplements, subsidies, early retirement benefits, postretirement benefit increases, surviving spouse benefits, and death benefits. This subsection applies regardless of the characterization of the pension, annuity, or retirement benefit as regular retirement, early retirement, disability retirement, death benefit, or any other characterization or classification, unless the judgment of divorce or judgment of separate maintenance expressly excludes a particular characterization or classification." MCL 552.101(4), *emphasis added.*

[4] More specifically, 26 USC §414(p)(6)(B) merely states "[e]ach plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders." Notably, 26 USC §414(p) subparts 6(A) and (7) provide details as to how

discretion to reject[5] QDROs if the terms do not comport with their guidelines, which could necessitate further review by the court.

The process of attaining qualification/acceptance of a QDRO by a plan administrator can be further complicated by the time spent by the plan reviewing the QDRO after entry. *See* 26 USC §414(P)(7)[6] and 26 USC §1056(d)(3)(H) (18-month time frame for plan administrators to review and issue a determination as to a domestic relations order submitted for qualification). Parties and counsel are often unable to anticipate the amount of time that the administrator will spend reviewing the QDRO, and there may be a change in the participant's status in the plan during the review time period. Further, neither 26 USC §414(p) nor 29 USC §1056(d) place limits on the frequency that plans can modify their procedures, which can result in rejection of a previously acceptable QDRO if there have been changes in the plan's procedures following entry of the QDRO but prior to completion of the plan's review of the QDRO. When review delays, changes in the participant's plan status prior to qualification, or

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and when plan administrators are to notify the participant and alternate payee of the procedures, and states how and when funds are to be paid. But there is no further guidance within 26 USC §414(p) as to what constitutes a reasonable basis for rejection/qualification of a proposed domestic relations order. Similarly, 26 USC §1056(d)(3)(G)(ii) also requires the establishment of "reasonable procedures" and states how plan administrators are to provide written notification of the procedures, but does not include restrictions on what basis the administrators are to accept or reject domestic relations order during the qualification process.

[5] In other words, refusal to "qualify" the QDRO, rendering it ineffectual and necessitating entry of a corrective or amending order.

[6] 26 USC §414(p)(7) details the procedures for plan administrators who are presented with proposed domestic relations orders for benefit plans that are in pay status or contribution plans that are eligible for distribution. This subsection details how a plan administrator is to handle funds during the 18 month review period, but does not restrict a plan's review time to 18 months. Subsection §414(p)(7)(D) pertains to determinations that are made "after the close of the 18-month period", suggesting that it would be permissible for plans to take longer than 18 months to complete review of the proposed domestic relations order.

changes in plan procedures occur, the previously submitted QDRO may no longer comport with the plan requirements, necessitating a new or amended QDRO to be submitted for entry. In such cases, further consideration of the terms of the QDRO may be required to ensure that the language necessary to achieve plan approval comports with the intent expressed in the Judgment and the requirements of MCL 552.101(4).

In sum, due to forces outside the control of the parties, it is necessary in some cases for courts to exercise discretion so as to fully effectuate the terms within a Judgment related to the distribution of retirement interests. The need to exercise discretion excludes the preparation/entry of a QDRO from the category of 'ministerial tasks.' As such, while the result in *Joughin* was correct, the blanket rule in *Joughin* (as interpreted by *Dorko)* that MCL 600.5809 does not time-bar entry of a QDRO on the basis of the QDRO being merely a ministerial task is incorrect.

III. Whether the Plaintiff/Appellant in Dorko waived any statute of limitations defense. (Michigan Supreme Court Question 1).

Short Answer: No, for the reasons that the time-bar in the Statute of Limitations would not take effect until 2024 or 2025. Any attempt to assert the Statute of Limitations defense during the underlying proceedings would have been premature.

* * * * *

Based on the answers to the questions detailed above, there is no question of waiver of the Statute of Limitations defense because under the facts of the case, the Statute of Limitations did not apply. Our position is that the Statute of Limitations applies to a claim for retirement assets under a Judgment of Divorce or Qualified Domestic Relations Order, and said right accrues when an alternate payee could

receive the benefit/funds awarded in the Judgment, regardless of when a Qualified Domestic Relations Order is entered.

Assuming that Appellant initiated the pension benefits on or near the first opportunity that he had to do so, Appellee's claim would have begun to accrue contemporaneous with Appellant's initiation or receipt of the pension payments in 2014 or 2015. The ten-year time bar of MCL 600.5809(3) would not take effect until ten years after Appellee could have received the benefit/funds awarded to her, and attempts to collect her share would not be barred until 2024 or 2025. As there is no Statute of Limitations defense available until 2024 or 2025, it could not have been waived by either party in the 2015-2016 proceedings.

REQUESTED RELIEF

The Family Law Section requests that this Court consider the arguments detailed herein and issue an opinion which holds:

1) The Statute of Limitations applies to a claim for retirement assets under a Judgment of Divorce or Domestic Relations Order, and said right accrues when an alternate payee could receive the benefit/funds awarded in the Judgment, regardless of when the Domestic Relations Order is entered.

2) MCR 2.602(B) governs the practice and procedure of entry of orders. The Statute of Limitations pertains to enforcement of obligations in orders. It is an interpretive error to overlay the Statute of Limitations onto MCR 2.602(B), as doing so adds a limitation not otherwise included in the plain language of the court rule.

3) The court in *Joughin v Joughin*, 320 Mich App 380 (2017), reached the right result, though for the wrong reason. The *Joughin* court incorrectly held that entry of a Qualified Domestic Relations Order is a 'ministerial' action.

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Dated: November 27, 2018 By:_____
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