Michigan Supreme Court
Lansing, Michigan

Syllabus

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DORKO v DORKO

Docket No. 156557. Argued on application for leave to appeal March 6, 2019. Decided June 20, 2019.

Plaintiff, Richard W. Dorko, and defendant, Sherry S. Dorko, obtained a judgment of divorce in the Kalamazoo Circuit Court on August 3, 2005, that awarded defendant half of the marital interest in plaintiff's pension and retirement benefits. Plaintiff retired in 2014 and began collecting his full pension and retirement benefits. Ten years and eight days after entry of the divorce judgment, defendant submitted a proposed qualified domestic-relations order (QDRO) to the trial court, which entered the order on August 19, 2015. Defendant then submitted the proposed QDRO to the pension plan administrator, Fidelity. On January 4, 2016, Fidelity refused to qualify the proposed QDRO because of deficiencies in the draft language, which defendant corrected in an amended proposed QDRO that she submitted to the trial court on January 8, 2016. Plaintiff objected and moved to set aside the first proposed QDRO and to deny the amended QDRO, arguing that entry of any QDRO was barred by the 10-year period of limitations in MCL 600.5809(3), which applies to the enforcement of noncontractual money obligations. The trial court, G. Scott Pierangeli, J., denied plaintiff's motion and entered the amended proposed QDRO on June 27, 2016, ruling that the 10-year period of limitations in MCL 600.5809(3) began to run only once plaintiff's retirement benefits became due following his retirement, not upon entry of the divorce judgment in 2005. After granting plaintiff's application for leave to appeal, the Court of Appeals, BOONSTRA, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ., concluded in an unpublished per curiam opinion issued August 17, 2017 (Docket No. 333880), that it was bound by *Joughin v Joughin*, 320 Mich App 380 (2017), which held that MCL 600.5809(3) does not apply to a party's request to enter a proposed QDRO, and that defendant was therefore not time-barred from submitting a proposed QDRO for entry. Plaintiff applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 502 Mich 878 (2018).

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal, *held*:

The limitations period in MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO because such a request does not involve an action to enforce a noncontractual money obligation; it merely seeks to implement a provision of the divorce judgment. Accordingly, the Court of Appeals reached the correct conclusion by affirming the trial court order in this case.

However, *Joughin* erred by holding that entry of a proposed QDRO is a ministerial task. The Court of Appeals judgment was vacated to the extent that its reasoning was based on the aspects of *Joughin* that were inconsistent with this opinion.

1. MCL 600.5809 sets forth the period of limitations governing the enforcement of judgments. MCL 600.5809(1) provides that 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 MCL 600.5809. MCL 600.5809(3) provides, in relevant part, that the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record in this state from the time of the rendition of the judgment or decree. MCL 600.5809(3) further states that within this limitations period, an action may be brought upon the judgment or decree for a new judgment or decree, which in turn is subject to MCL 600.5809(3). In *Joughin*, the Court of Appeals correctly held that MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO because such a request does not involve an action to enforce a noncontractual money obligation; it merely seeks to implement a provision of the divorce judgment. In other words, a party's request for entry of a proposed QDRO does not involve a distinct legal claim, and only claims can be barred by a statute of limitations.

2. The *Joughin* majority erred by holding that entry of a proposed QDRO is a ministerial task. Although a proposed QDRO must reflect the terms of the judgment of divorce, it must also meet the requirements of a plan administrator before the administrator will qualify it. Federal law specifies certain minimum requirements for QDROs, but it does not otherwise limit a plan administrator's discretion to determine plan procedures, and plan administrators have discretion to reject proposed QDROs that do not comply with their guidelines. The review process before a proposed QDRO is qualified can be lengthy, during which time a participant's status in the plan or the plan procedures can change. Such a change may necessitate entry of a new or amended proposed QDRO and further exercise of discretion by a trial court to ensure that the order effectuates the terms of the divorce judgment. Therefore, entry of a QDRO is not a ministerial task prescribed and defined by law with such precision and certainty that it leaves nothing to the trial court's discretion or judgment.

Court of Appeals judgment affirmed in part and vacated in part; case remanded to the Kalamazoo Circuit Court for further proceedings.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED June 20, 2019

S T A T E O F M I C H I G A N

SUPREME COURT

RICHARD WILLIAM DORKO,

Plaintiff-Appellant,

v No. 156557

SHERRY SUE DORKO,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

PER CURIAM.

In this case, we consider whether the 10-year period of limitations in MCL 600.5809(3) applies to a party's request to enter a qualified domestic-relations order (QDRO)[1] when a judgment of divorce awards an interest in a spouse's retirement benefits.

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[1] Under the applicable federal statute, 29 USC 1056(d)(3)(B)(ii), such orders are referred to only as "domestic relations orders," and are therefore sometimes referred to as "DROs." The orders do not become "qualified" until they are approved by a plan administrator. For the sake of consistency with the reference used by the Court of Appeals, we refer to

The Court of Appeals concluded that it was bound by *Joughin v Joughin*, 320 Mich App 380; 906 NW2d 829 (2017), which held that MCL 600.5809(3) does not apply to a party's request to enter a proposed QDRO, and that defendant-wife was therefore not time-barred from submitting a proposed QDRO for entry. We agree with *Joughin*'s holding that MCL 600.5809(3) does not apply to a request to enter a proposed QDRO, and thus affirm the result reached by the Court of Appeals in this case, but we write to clarify the reasons this holding is correct.

I. BACKGROUND

The parties divorced on August 3, 2005, following a 28-year marriage. The judgment of divorce awarded defendant-wife half of the marital interest in plaintiff-husband's pension and retirement benefits via a QDRO. The judgment stated:

> **Qualified Domestic Relations Order:** Defendant is awarded ½ of the marital interest of Plaintiff's retirement plan via QDRO through employment with General Motors. She shall share in any early retirement subsidy under the Plan in proportion to her award. She shall be entitled to csot-of-living [sic] and other post-retirement increases in proportion to her award. She shall be allowed to elect to receive benefits under the Plan as soon as the Plan permits. To the extent necessary to protect her interest in the event of Plaintiff's death, she shall be designated surviving spouse.

Plaintiff retired in 2014 and began collecting his full pension and retirement benefits. Ten years and eight days after entry of the divorce judgment, defendant submitted a proposed QDRO to the trial court. Receiving no response and no objection, the trial court entered the order on August 19, 2015. Defendant then submitted the proposed QDRO to

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domestic-relations orders that have not yet been approved by a plan administrator as "proposed QDROs." See *Joughin v Joughin*, 320 Mich App 380, 383 n 2; 906 NW2d 829 (2017).

the pension plan administrator, Fidelity. On January 4, 2016, however, Fidelity refused to qualify the proposed QDRO because of deficiencies in the draft language. Defendant corrected the identified deficiencies and submitted an amended proposed QDRO to the trial court on January 8, 2016. Plaintiff objected and, after retaining an attorney, moved to set aside the first proposed QDRO and to deny the amended QDRO. In his motion, plaintiff argued that entry of any QDRO was barred by the 10-year period of limitations in MCL 600.5809(3), which applies to the enforcement of noncontractual money obligations. The trial court denied plaintiff's motion and entered the amended proposed QDRO on June 27, 2016. It also denied plaintiff's motion for a stay. Ruling from the bench, the trial court concluded that the 10-year period of limitations in MCL 600.5809(3) began to run only once plaintiff's retirement benefits became due following his retirement, not upon entry of the divorce judgment in 2005. Defendant submitted the amended proposed QDRO to Fidelity, and by letter of August 12, 2016, Fidelity approved the amended QDRO.

Plaintiff filed an application for leave to appeal in the Court of Appeals, which the Court granted. At the time, another case involving the application of MCL 600.5809(3) to the entry of a proposed QDRO, *Joughin*, 320 Mich App 380, was also pending before the Court of Appeals. The Court of Appeals decided *Joughin* on July 11, 2017, in a split, published decision. In *Joughin*, the majority held that "the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself." *Id*. at 388. Therefore, "because the entry of the proposed QDRO is not an enforcement of a noncontractual money obligation, the 10-year period of limitations provided in MCL 600.5809(3) does not apply, and [the] request to have the proposed QDRO entered by the

trial court was not time-barred." *Id*. at 389.[2] Relying on *Joughin*, the panel in the instant case held that "defendant's submissions of the proposed QDROs were merely ministerial tasks attendant to the judgment of divorce, which are not time-barred by MCL 600.5809(3)." *Dorko v Dorko*, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2017 (Docket No. 333880), p 2.

Plaintiff applied for leave to appeal in this Court, and we ordered argument on the application, asking the parties to address whether plaintiff waived any statute-of-limitations defense, whether *Joughin* was correctly decided, and when, if MCL 600.5809(3) applies, a claim accrues for retirement benefits awarded by a judgment of divorce.

II. ANALYSIS

Retirement plans must comply with the federal Employee Retirement Income Security Act (ERISA) of 1974, 29 USC 1001 *et seq*., which precluded pension plan participants from assigning or alienating their benefits under plans that were subject to the act. *Roth v Roth*, 201 Mich App 563, 567; 506 NW2d 900 (1993), citing 29 USC 1056(d)(1) and 26 USC 401(a)(13). ERISA also contained a preemption provision, designed to establish the regulation of pension plans as an exclusively federal concern. *Roth*, 201 Mich App at 567; 29 USC 1144; *Pilot Life Ins Co v Dedeaux*, 481 US 41, 46; 107 S Ct 1549; 95 L Ed 2d 39 (1987). In 1984, however, Congress enacted the Retirement Equity Act, which provided an exception to the restriction on assigning or alienating one's benefits by allowing QDROs. A QDRO " 'creates or recognizes the existence of an

[2] The parties in *Joughin* did not ask this Court to review the Court of Appeals' decision.

alternative payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan . . . .' " *Moore v Moore*, 266 Mich App 96, 100 n 5; 700 NW2d 414 (2005), quoting 29 USC 1056(d)(3)(B)(i)(I). QDROs are thus exempt from ERISA's preemption provisions and may be used to distribute funds to a payee who is not a named beneficiary under a retirement plan. 29 USC 1144(b)(7); 26 USC 401(a)(13)(B). Accordingly, when a judgment of divorce awards an interest in a retirement plan under ERISA to an alternate payee spouse, entry of a proposed QDRO is a necessary prerequisite to effectuate the distribution of benefits pursuant to that interest. The question we are faced with here is whether the 10-year limitations period in MCL 600.5809(3) applies to a party's request to enter a proposed QDRO. We review de novo questions involving the interpretation and application of a statute of limitations. See *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001).[3]

[3] At the outset, we reject defendant's argument that plaintiff waived any statute-of-limitations defense under MCR 2.111(F)(3) ("Affirmative defenses must be stated in a party's responsive pleading . . . .") or MCR 2.116(D)(2) ("The grounds listed in subrule (C) . . . (7) [statute of limitations] must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading."). A party's request for entry of a QDRO is not a "pleading" requiring a "responsive pleading" under the court rules. See MCR 2.110(A) and (B). Although plaintiff did not respond when defendant submitted her first proposed QDRO, he also did not assent to the entry of that order. And in any event, the original proposed QDRO has no value or effect at this point, given that Fidelity refused to qualify the order. Regarding the second proposed QDRO, plaintiff raised his statute-of-limitations argument before any hearing on his initial objections. Under the circumstances, this issue is not waived. See *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006) (defining waiver as the intentional relinquishment of a known right).

MCL 600.5809 sets forth the period of limitations governing the enforcement of judgments and provides, in pertinent part, the following:

> (1) 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.
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> * * *
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> (3) 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 in this state . . . from the time of the rendition of the judgment or decree. . . . Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for a new judgment or decree. The new judgment or decree is subject to this subsection.

In *Joughin*, 320 Mich App at 389, the majority held that MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO because such a request does not involve an *action* to enforce a noncontractual money obligation. We agree. A party's request for entry of a proposed QDRO does not involve a distinct legal "claim." Only claims can be barred by a statute of limitations. A 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. But the right to seek a postjudgment order does not arise from a wrong; instead, that right arises out of the divorce judgment itself. Asking a court to enter a proposed QDRO is therefore not an "action" that can be time-barred by a statute of limitations because the order does not depend on any underlying *cause* of action.[4] Rather, such a request merely implements a provision of the divorce judgment.

[4] Further, Michigan law provides that a civil "action" may only be commenced "by filing

There is an important distinction between a postjudgment *order* that implements a term of a divorce judgment and an *action* to enforce that judgment. Entry of postjudgment orders is governed by the court rules, involves no new case or controversy, and is adversarial only to the extent that the parties dispute whether the order appropriately implements the judgment. Here, defendant's right to *entry* of the proposed QDRO had already been adjudicated. Accordingly, although plaintiff could object to the form or content of defendant's proposed QDRO, he did not have any right to challenge the entry of the proposed QDRO itself.[5] Defendant's procedural right to entry of the proposed QDRO was indisputably established by the judgment of divorce.

We must differentiate between defendant's *procedural* entitlement to entry of a proposed QDRO and her *substantive* right to receive 50% of plaintiff's retirement benefits. When a party breaches a substantive obligation arising out of a legal judgment, that breach gives rise to an independent cause of action. The harmed party then acquires the right to

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a complaint with the court." MCL 600.1901; see also MCR 2.101(A). Requesting the entry of a proposed QDRO is not the same as filing a complaint.

[5] Relying on *Neville v Neville*, 295 Mich App 460, 467; 812 NW2d 816 (2012), the *Joughin* majority concluded that a proposed QDRO is *part of* the divorce judgment itself, such that a party's request to enter the QDRO could not be construed as an action to enforce the same. But *Neville* did not involve the question whether MCL 600.5809(3) applies to a party's request to enter a proposed QDRO pursuant to a judgment of divorce. Instead, the issue in *Neville* was whether a defendant's challenge to a proposed QDRO *already entered* was timely under MCR 2.612(C), which governs motions for relief from judgment. The *Joughin* majority's reliance on *Neville* was therefore misplaced. We need not decide today whether *Neville* correctly held that a proposed QDRO, once entered, is properly considered *part of* the judgment of divorce. For purposes of this case, it is sufficient to say that a party's request for entry of a proposed QDRO does not involve an "action" under MCL 600.5809, such that the statute of limitations does not apply.

bring an action to enforce the judgment. Applying this distinction to the facts here, when plaintiff retired and began collecting 100% of his retirement benefits due, in contravention of the terms of the divorce judgment, a distinct "wrong" occurred, giving rise to a cause of action that defendant could bring to enforce the noncontractual money obligation imposed by the judgment of divorce. Accordingly, if defendant wanted to recover those payments plaintiff collected in contravention of the divorce judgment, she would have 10 years to do so under MCL 600.5809(3). But again, an action to redress the breach of a substantive obligation arising under a divorce judgment is distinct from the procedural entry of a postjudgment order required by the judgment.[6] In sum, although MCL 600.5809(3) does not apply to defendant's request for entry of a proposed QDRO, it *would* apply to any attempts she made to recover retirement benefits plaintiff has received in violation of the substantive requirements of the divorce judgment.

Although a party's request for entry of a proposed QDRO implicates a procedural rather than a substantive right, we disagree with the *Joughin* majority that entry of a proposed QDRO is a ministerial task. A ministerial act is one "where the law prescribes

[6] In *Rybinski v Rybinski*, 333 Mich 592, 596; 53 NW2d 386 (1952), we held that the 10-year period of limitations in the predecessor statute to MCL 600.5809(3) applied when a party filed a petition within the divorce action itself, seeking to enforce a support obligation provided by the divorce decree. Likewise, in *O'Leary v O'Leary*, 321 Mich App 647, 654; 909 NW2d 518 (2017), the Court of Appeals held that MCL 600.5809(3) applied to a party's postjudgment motion in a divorce action, seeking to divide equally the debt outstanding after sale of the marital home, as provided in the divorce judgment. Although the harmed parties in these cases did not technically file separate actions or new complaints, the rights they were seeking to enforce were *substantive* rights provided in the divorce judgments, meaning they *could have* filed independent enforcement actions. Thus, these cases are distinguishable from the circumstances here because a party's request for entry of a proposed QDRO implicates only a procedural, and not a substantive, right.

and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Solo v Detroit*, 303 Mich 672, 677; 7 NW2d 103 (1942) (quotation marks and citations omitted). Entry of a proposed QDRO is not so simple. Although a proposed QDRO must reflect the terms of the judgment of divorce, the order must also meet the requirements of a plan administrator before the administrator will qualify it. See 26 USC 414(p)(3); 29 USC 1056(d)(3)(D) (domestic-relations orders cannot require a plan to provide a type of benefit, form of benefit, or other option not otherwise provided for in the plan). Federal law specifies certain minimum requirements for QDROs, 26 USC 414(p)(2); 29 USC 1056(d)(3)(C), but it does not otherwise limit a plan administrator's discretion to determine plan procedures. And plan administrators have discretion to reject proposed QDROs that do not comply with their guidelines. The review process before a proposed QDRO is qualified can be lengthy,[7] during which time a participant's status in the plan or the plan procedures can change. A change in participant status or the plan procedures may necessitate entry of a new or amended proposed QDRO and further exercise of discretion by a trial court to ensure that the order effectuates the terms of the divorce judgment. Therefore, entry of a QDRO is not a ministerial task prescribed and defined by law with such precision and certainty that it leaves nothing to the trial court's discretion or judgment. See *Taylor v Ottawa Circuit Judge*, 343 Mich 440, 444; 72 NW2d 146 (1955).

[7] 26 USC 414(p)(7); 29 USC 1056(d)(3)(H) (providing an 18-month time frame for plan administrators to review and then reject or qualify a domestic-relations order).

III. CONCLUSION

In sum, we agree with the Court of Appeals that MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO provided for in a judgment of divorce; defendant was not time-barred from submitting her request. But, as explained in this opinion, we disagree with certain aspects of the reasoning the *Joughin* majority used to reach this conclusion. We thus affirm the judgment of the Court of Appeals in part, vacate it in part, and remand the case to the Kalamazoo Circuit Court for further proceedings not inconsistent with this opinion.

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