COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3066

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

NANCY D. MCNAMARA,

PETITIONER-APPELLANT,

V.

EDWARD J. MCNAMARA,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. This is a post-divorce proceeding initiated to determine how Nancy McNamara's Wisconsin Retirement System pension should be divided between the parties. Nancy and her then husband, Edward McNamara, agreed in

their 1985 divorce to divide their property equally. And because it was impractical for Nancy to make an "equalization" payment to Edward reflecting a one-half interest in the value of her pension fund at that time, provisions were included in the judgment to achieve that division at the time of her eventual retirement. A dispute arose over the appropriate division upon her retirement in 1998, however, and the parties offer opposing views as to what the judgment requires.

¶2 The circuit court accepted a determination by the Department of Employee Trust Funds that Edward was entitled to receive $965.47 from Nancy's total monthly benefit of $2,642.23. Nancy appeals, claiming that the department used the wrong formula and asserting that Edward is entitled to only $391.20 per month. We affirm.

¶3 Because of the impracticality of an equalization payment from Nancy to Edward reflecting a one-half interest in her pension-fund interest—which was valued at $25,000 at the time of their 1985 divorce—the parties retained an actuary, Thomas Custis, to assist them in devising a method of assigning an interest in that fund to Edward that would be realized sometime in the future. The judgment, as stipulated by the parties, contained the following provision to that end:

> A Qualified Domestic Relations Order (QDRO) with respect to the parties['] separate interests in the … Fund shall be furnished to the Fund. The Order shall specify that each party has a 50% interest in the total account … as of 4/11/85….
>
> The QDRO shall direct that 50% of what existed in the entire account shall be allocated as of April 11, 1985, [50%] to Edward … and 50% to Nancy …. Any increase in the account by virtue of an increase of the value of the

> segregated account in [Edward]'s name from and after April 11, 1985 shall accrue to his benefit solely.
>
> Any increase in the 50% interest of Nancy … as of April 11, 1985, shall accrue to her benefit only….
>
> … The purpose of the Court is to absolutely equalize, after tax impact, the portions of the benefits assigned to each party as of April 11, 1985.

¶4 The judgment went on to state that "in the event the [Department of Employee Trust Funds] refuses to honor a Qualified Domestic Relations Order on grounds that Federal pension [laws] do not apply to official State of Wisconsin pension plans,[1] or in the event the State of Wisconsin does not adopt similar provisions," Edward's share of Nancy's pension interest was to be calculated pursuant to a formula devised by Custis to estimate what, based on his assumptions of the nature and operation of the fund, Edward would receive on Nancy's retirement. The formula would result in a specific dollar amount to be received by Edward, calculated as follows: one-half of a fraction whose numerator was a multiple of Nancy's completed years of service as of the divorce date and her average salary in the three years preceding the divorce, and whose denominator would a multiple of Nancy's total years of service at retirement and her salary in the three years preceding her retirement. The result of the formula, apparently, is a specific sum to Edward (and to Nancy).

¶5 A QDRO was prepared in accordance with the judgment, and, as predicted, the department declined to accept it, presumably on grounds that it lacked authority to do so.[2] By the time Nancy retired in 1998, however, changes

[1] In 1985, federal law permitted interests in federal government pension plans to be divided in divorce proceedings *via* QDROs.

[2] Neither the 1985 QDRO nor the department's rejection of it appear in the record. As indicated below, however, it is clear that, in 1985, the department lacked authority to divide a participant's interest in the fund.

were made in Wisconsin law to permit the department to honor QDROs—and to do so retroactively.[3] Learning of Nancy's retirement, Edward submitted a QDRO to the court reflecting the 50-50 division of Nancy's interest in the fund as of the date of the 1985 divorce judgment. It was signed by the court and transmitted to the department. The department then calculated that, based on that division, the amount that Edward would be entitled to receive if it had "been able to divide the account per a QDRO when the divorce originally occurred in 1985," would be $965.47 (out of Nancy's total monthly annuity of $2,642.23).

¶6 Nancy asked the court to vacate the order and to enter an order based on the Custis formula—which would result in Edward's receiving $391.20 from her monthly pension—and the court did so, entering a second QDRO directing the department to "enter a 'zero' percent (0%) Qualified Domestic Relations Order, and provide a payment order of $391.20 per month … to Edward.…" When Edward objected to this order, the court scheduled an evidentiary hearing.

¶7 At the hearing, a representative of the Department of Employee Trust Funds explained how the agency had calculated Edward's $965.47 share of Nancy's pension. Custis also testified, stating that the alternative formula was believed to be fair to both parties, and was agreed to by them, at the time of the divorce, and that the department's calculations produced a different result than that previously agreed upon by the parties.

¶8 In its post-hearing findings, the court restated the differing calculations, finding that the department's calculation was "fundamentally different" from that obtained by use of the Custis formula, with the result that

[3] The applicable statutes are discussed in more detail below.

Nancy would gain only an additional $725 per month for the thirteen years she continued to work after the 1985 judgment. According to the court, neither party contemplated such a result at the time of the divorce—specifically that "the obvious intent behind the formula was that Ed[ward] would not benefit from any increases in the pension created by Nancy's continued employment."[4] Then, while noting that the department's calculation was neither "equitable [n]or fair," the court went on to conclude that, given the provisions of WIS. STAT. § 40.08(1m) (1997-98),[5] the statute permitting division of a WRS participant's benefits pursuant to a QDRO, the court was compelled to accept it—"against the Court's better judgment and common sense."

¶9 WISCONSIN STAT. § 40.08(1), as it existed in 1985 and as it exists today, provides that WRS benefits may not be assigned by the participant, or by any legal process, except as specifically provided in the statute. In 1985, as indicated, there was nothing in the statute permitting assignment or division of a participant's interest other than by waiver or abandonment of that interest in its entirety, or in order to correct over- or under-payments.[6] The provision now allowing division, § 40.08(1m)(a), states that a WRS participant's accumulated rights and benefits may be divided pursuant to a QDRO "only if the order provides for a division as specified in this section." The statute goes on to state that the

[4] As we note at several points in this opinion, the stipulated judgment plainly states that any "increase in … the value of the segregated account in [Edward]'s name from and after April 11, 1985, shall accrue to his benefit solely."

[5] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[6] *See* WIS. STAT. § 40.08(1) (1983-84).

order shall be drawn in terms of "percentages."[7] Section 40.08(1m)(d). The authorization to assign or "divide" a participant's WRS benefits is made retroactive for "qualified domestic relations orders issued on or after January 1, 1982, that provide for division of the accumulated rights and benefits of participants whose marriages have been terminated by a court on or after January 1, 1982." Section 40.08(j). The statute then says that

> a court may revise or modify a judgment or order [with respect to a final division of property] for participants whose marriages were terminated [between 1982 and 1990], but only with respect to providing for payment in accordance with a qualified domestic relations order of benefits under the Wisconsin retirement system that are already divided by the judgment or order.

Section 40.08(1m)(k)2.

¶10 The plain language of the parties' stipulated divorce judgment—which we have accepted above—directs that a QDRO be prepared and submitted to the WRS providing that Nancy's then-existing interest in her WRS fund be divided in half, with Nancy and Edward each receiving a 50% interest—and that each party's 50% interest is to be segregated and "any increase" in that segregated interest between the time of the divorce and Nancy's eventual retirement "shall accrue to [the] benefit" of each party. It was only if the department refused to accept the QDRO that the Custis formula would come into play.

¶11 As indicated, the QDRO prepared in 1985 was rejected by the WRS because (we assume), at that time—prior to the enactment of WIS. STAT. § 40.08(1m)—it lacked authority to assign or divide a participant's interest in the

[7] As indicated, the order submitted by Nancy (the second one signed by the circuit court) directed the department to pay Edward a specific sum.

fund, whether by a QDRO or any other "legal process." *See* § 40.08(1). That authority came later, as we have discussed; and, when Nancy retired in 1998, the department accepted a newly-drawn QDRO setting forth the "50% segregated interest" provisions of the 1985 judgment and calculating the amounts receivable by each party pursuant to those provisions.

¶12 Nancy says this is wrong. She contends that the Custis formula was triggered by the department's initial rejection of the QDRO submitted in 1985, and that the portion of her pension benefit to which Edward is entitled is limited to the amount calculated under that formula—$391, not $935. Edward argues, on the other hand, that because the WRS accepted the QDRO at the crucial time—the time of Nancy's retirement, when the actual division/assignment of her interest was to take place—the primary terms of the judgment were met, and the alternative formula was never triggered.

¶13 The circuit court appears never to have considered whether, on the facts of the case, the department "refused to honor" the QDRO based on the 50% segregation/accumulation within the meaning of the judgment—thus triggering application of the Custis formula. We are satisfied that the department did not refuse to honor the QDRO. As indicated, the plain terms of the judgment indicate that the formula was to be used only "in the event the State of Wisconsin does not adopt … provisions [authorizing division of WRS benefits pursuant to QDROs]." And it is undisputed that, by the time Nancy retired, Wisconsin had indeed adopted such a law and the department accepted a QDRO setting forth the terms of the judgment entitling both parties to the increases in their 50% share in Nancy's account as it existed on April 11, 1985. In other words, what was initially contemplated in the judgment—acceptance of a QDRO—came to pass. The condition triggering application of the Custis formula—Wisconsin's failure to pass

a law authorizing division of WRS interests pursuant to QDROs—dropped out of the picture when the legislature enacted just such a law.

¶14 We share the court's sympathy with Nancy's position. She made her retirement decision assuming that the alternative calculation of Edward's interest would prevail. In the end, however, Edward received what the parties agreed in 1985 that he should eventually receive—a QDRO directing the department to allocate to him a fifty-percent interest in Nancy's pension fund as it existed at that time, together with the "any increase in … the value of [his] segregated account from and after April 11, 1985…." Nancy's wish to have Edward's interest calculated on what the actuary thought might be the case in 1998, rather than what actually came to pass, is contravened by the terms of her 1985 agreement and the court's judgment entered thereon.

¶15 Finally, Edward has moved for costs and fees under the frivolous appeal statute, WIS. STAT. § 809.25(3), claiming that Nancy and/or her attorney knew, or should have known, that her appeal lacked any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. While we have agreed with Edward's position and have affirmed the circuit court's order, we cannot say that Nancy's appeal was frivolous under that standard. While we have concluded that the plain language of the judgment compelled affirmance of the circuit court's order, there was room in this record for Nancy to argue at least that the department's rejection of the initial QDRO in 1985 had triggered the alternative formula. There was room also, we think, given the circuit court's comments and the testimony at the evidentiary hearing, for a good faith argument that the Custis formula met the parties' expectations and intentions at the time of the divorce. We therefore deny the motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.