IN THE COURT OF APPEALS OF IOWA

No. 0-249 / 09-1312
Filed May 26, 2010

**IN RE THE MARRIAGE OF TAMARA D. VEIT
AND GREGORY H. VEIT**

**Upon the Petition of
TAMARA D. VEIT,**
Petitioner-Appellee,

**And Concerning
GREGORY H. VEIT,**
Respondent-Appellant.

Appeal from the Iowa District Court for Adair County, Gregory A. Hulse, Judge.

Respondent appeals from the district court's order regarding a Qualified Domestic Relations Order. **REVERSED AND REMANDED.**

Rodney Powell of The Powell Law Firm, P.C., Norwalk, for appellant.

Willard W. Olesen of The Olesen Law Firm, P.L.C., Greenfield, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

VOGEL, P.J.

I. Background Facts and Proceedings.

Gregory and Tamara were married in 1984. Tamara filed a petition for dissolution of marriage in July 2007. On the morning of the scheduled trial, the parties reached an agreement regarding the division of marital assets. On February 15, 2008, the district court entered a decree of dissolution, which adopted the parties' stipulation. As part of the property settlement, Gregory was ordered to pay $127,000 to Tamara within sixty days of the decree being filed. Neither party appealed from the dissolution decree.

Before the payment to Tamara was due, Gregory's attorney contacted Tamara's attorney. Gregory's attorney proposed that Gregory pay the $127,000 through a Qualified Domestic Relations Order (QDRO) of Gregory's Cemen Tech, Inc. employee stock ownership plan believing there would be no tax consequences to either party to do so. According to an affidavit filed by Tamara's attorney, the source of the funds was not important so long as Tamara received $127,000 and it was understood by both parties' attorneys there would be no tax consequences to Tamara. Gregory's attorney prepared a QDRO that assigned Tamara $127,000 of stock, which was not subject to gains or losses and was to be distributed to Tamara as soon as practicable. The QDRO contained a provision that stated Tamara "shall be fully responsible for any and all tax consequences resulting from the award and payment of Plan benefits." Both parties' attorneys signed the QDRO and it was approved by the district court on March 17, 2008. Subsequently, Tamara attempted to withdraw the $127,000 and discovered there were tax consequences upon withdrawal in the

amount of $27,032. On the advice of her attorney, she did not proceed with the withdrawal.

On March 6, 2009, Tamara filed a motion requesting that the district court either: (1) set aside the QDRO, (2) modify the QDRO so that she would receive a net amount of $127,000, or (3) enforce the dissolution decree by ordering Gregory to pay her an additional sum so that she would receive a net amount of $127,000. A hearing was held on June 22, 2009, during which the parties stipulated to a statement of facts, which included that, "It was represented to [Gregory] and by [his attorney], and [Tamara] believed it to be true, that there would be no tax consequences to either party as a result of [Tamara] cashing in this $127,000 in the plan."

On July 30, 2009, the district court ruled on Tamara's motion. The court found that the dissolution decree provided that Gregory was to pay Tamara $127,000 and when they agreed to the QDRO, the parties received "mistaken information" that there would be no tax consequences to either party. The court considered this to be a mutual mistake that allowed for the reformation of the QDRO. As the QDRO was entered, it failed to satisfy the terms of the decree. Under the terms of the decree, Tamara should receive a total of $127,000 and the QDRO only satisfied this obligation to the extent of $127,000 minus the tax liability. Therefore, Gregory was ordered to pay the remaining balance by either a reformed QDRO or using alternative assets. Finally, the district court found "the QDRO was not a property division, but rather a method to effectuate the property division provided for in the dissolution decree." As a result, the QDRO could be modified. Therefore, the district court granted Tamara relief by ordering

Gregory to pay the difference between the award of $127,000 and the net proceeds after taxes. Gregory appeals.

II. Standard of Review.

Our review is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009).

III. Modification of QDRO.

Gregory first argues that a QDRO cannot be modified asserting it is an order for property and cites to Iowa Code section 598.21(7) (2009). This section provides that property divisions made in a divorce decree are not subject to modification. Iowa Code § 598.21; *Brown*, 766 N.W.2d at 647. In this case, neither party appealed the dissolution decree and therefore, the decree was "final and settled all rights and interests of the parties in the property of one another." *See Brown*, 776 N.W.2d at 647. In order to satisfy the property settlement payment due to Tamara, the parties attempted to utilize a QDRO. This was not part of the underlying judgment, but rather was utilized as an "aid to enforcing a previously entered judgment." *See id*. at 648 (discussing situations when a QDRO is intended to be collateral to the judgment). We agree with the district court that "the QDRO was not a property division, but rather a method to effectuate the property division provided for in the dissolution decree."

IV. Mutual Mistake.

Gregory next argues that the district court erred in finding there was a mutual mistake and thus reforming the QDRO. A mutual mistake occurs when the parties have reached an agreement, but the resulting writing does not express that agreement. *Schuknecht v. W. Mut. Ins. Co.*, 203 N.W.2d 605, 608

(Iowa 1973). "Generally, mutual mistake will render a contract voidable by the party who is adversely affected by the mistake when the parties are mistaken on a basic assumption on which the contract was made, unless the adversely affected party bears the risk of mistake." *Department of Human Servs. ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 150 (Iowa 2001).

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Davenport Bank & Trust Co. v. State Cent. Bank, 485 N.W.2d 476, 480 (Iowa 1992) (quoting Restatement (Second) of Contracts § 154, at 402-03 (1981)), *declined to follow on other grounds by Kern v. Palmer College of Chiropractic*, 757 N.W.2d 651, 658 (Iowa 2008).

Tamara had the burden of proving a mutual mistake. *See Gouge v. McNamara*, 586 N.W.2d 710, 713 (Iowa Ct. App. 1998). Prior to the entry of the dissolution decree, Gregory sent an email to his attorney regarding various negotiations between the parties. Included in that email was Gregory's insistence: "Cemen Tech ESOP Account[,] if she is going to take half early she can pay the taxes and penalties." Although the attorneys may have believed that there would be no tax consequences, the stipulated QDRO required Tamara to be responsible for any tax consequences upon withdrawal of funds. After the QDRO was prepared, Tamara's attorney reviewed it as to form and content and signed it on Tamara's behalf. Tamara cannot escape the fact that even though she now claims she did not think there would be any tax consequences, she

nonetheless agreed, through the authority delegated to her attorney, to be responsible if there were. The district court treated the QDRO as one means for Gregory to pay a total of $127,000 plus the tax consequences. We find this was in error. The parties did not agree nor intend that Gregory would be responsible for the tax consequences.

Furthermore, the district court assigned the burden of the tax consequences to Gregory by leaving it to his "discretion as to how to pay the remainder of the amount due to [Tamara]." Under these circumstances, we find the risk of mistake should be allocated to Tamara, who agreed to the QDRO requiring her to pay any tax consequences. Therefore, Tamara cannot prevail on a claim of mistake and we reverse and remand for entry of an order denying Tamara's motion to set aside or modify the QDRO and find that Gregory has paid his obligation in full. Costs on appeal are assessed to Tamara.

REVERSED AND REMANDED.

Potterfield, J. concurs. Danilson, J. dissents.

DANILSON, J. (dissenting)

I respectfully dissent.

The majority correctly recites that neither party appealed the dissolution decree and therefore the decree settled all property rights and interests of the parties. *See In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). The property settlement established in the decree is not subject to modification absent fraud, duress, coercion, mistake or other limited grounds specified in Iowa Rule of Civil Procedure 1.1012. Nonetheless, the majority permits a QDRO that is inconsistent with the decree to revise Tamara's property rights.

The parties' stipulation adopted by the decree requires Gregory to pay to Tamara the sum of $127,000 as a "monetary property settlement." The payment was to be made within sixty days of the filing of the decree. Neither the stipulation nor the decree recite that the payment be made via QDRO. Clearly, if Gregory was required to liquidate any assets to pay this sum, then any taxes incurred would be at his expense.

Here, the QDRO recited that "the parties have agreed that the $127,000 award to [Tamara] shall be paid through [the] QDRO." The QDRO also recited that "the alternate payee shall be fully responsible for any and all tax consequences resulting from the award and payment of Plan Benefits to Alternate Payee." Because the QDRO attempts to assign $127,000 of Gregory's pension to Tamara and impose the tax liability to her, Tamara will receive less than $100,000 net proceeds. Thus, the QDRO is inconsistent with the terms of the decree.

To succeed in his claim, Gregory had to prove that Tamara agreed to a sum less than her property rights established in the decree. The majority attempts to rely upon the terms of the QDRO as the terms, or evidence of the terms, of the parties' agreement. However, a QDRO is not a contract but is a supplemental court order to enforce the property division. *See id*. at 648-49. As a supplemental court order, it may be amended or modified, but not reformed like a contract. *See* Iowa R. Civ. P. 1.1012.

Even if the QDRO could serve the dual purpose of a supplemental court order and an agreement, or memorandum of the agreement, between the parties, this QDRO fails to recite all the contract terms that Gregory espouses. In particular, the QDRO does not state that Tamara accepts the $127,000 minus taxes as payment in full for Gregory's obligation established in the decree. This term, whether the payment via the QDRO constitutes payment in full, is at the heart of the parties' dispute.

The QDRO entered in this case only states that "the parties have agreed that the $127,000 award to the Petitioner shall be paid through a Qualified Domestic Relations Order (QDRO) from the Respondent's vested interest in Cemen Tech, Inc., Employee Stock Ownership Plan . . . ." Further, the stipulated facts reflect that Gregory's attorney represented to Tamara's attorney that there would be no tax consequence to either party by use of a QDRO. Tamara acknowledges that the QDRO drafted required her to pay taxes if any were imposed, but she clearly relied upon the representations that no taxes would be incurred.

Reformation of a contract involves changing the terms of a written document when it does not reflect the parties' true agreement. *Kufer v. Carson*, 230 N.W.2d 500, 503 (Iowa 1975). Here, there is no evidence that the parties ever agreed that the payment of $127,000 minus taxes to Tamara would constitute full payment of Gregory's obligation fixed by the decree. The district court describes this conflict as a mutual mistake, and clearly there was a mistake in respect to the potential tax consequences of the parties' actions. However, the facts may more accurately be described as a lack of a meeting of minds or mutual assent as to the specific term that Gregory now asks us to accept. *See Schaer v. Webster County*, 644 N.W.2d 327, 337 (Iowa 2002).

Whether the parties' agreement is embodied in the QDRO, the QDRO serves as a memorandum of their agreement, or their agreement was oral, the burden to prove the terms of the agreement is upon the party attempting to prove the existence of the contract. *Anderson v. Douglas & Lomason Co*., 540 N.W.2d 277, 283 (Iowa 1995). The burden of proof is by a preponderance of the evidence, except the terms of an oral agreement must be shown by clear and convincing evidence. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 630 (Iowa 1996). In this case the burden was upon Gregory to prove the terms of the agreement, not Tamara, as he is trying to uphold the agreement. *See Powell v. McBain*, 222 Iowa 799, 802-03, 269 N.W. 883, 885-86 (1936). However, Gregory's evidence fails to meet either burden of proof. Notwithstanding the terms of the QDRO, there is no evidence that Tamara ever agreed to accept $127,000 minus the tax liability as payment in full. The parties lacked a meeting of the minds and assent to such a term.

Tamara sought a court order to either set aside the QDRO or modify it. I would reverse and remand to set aside the QDRO and put the parties back to the position and rights afforded them after the entry of the decree.[1]

[1] Although not raised in this appeal, the alleged agreement also does not appear to be supported by consideration because Gregory was under a pre-existing duty to pay Tamara the sum of $127,000. *See Margeson v. Artis*, 776 N.W.2d 652, 656 (Iowa 2009).