STATE OF MINNESOTA
IN COURT OF APPEALS
A10-513

In re the Marriage of: Beverly Jean Lake Rowell, petitioner,
Respondent,

vs.

John Edwin Rowell,
Appellant.

Filed September 28, 2010
Affirmed
Stoneburner, Judge

Clay County District Court
File No. 14FA084335

Timothy J. McLarnan, McLarnan & Skatvold, Moorhead, Minnesota (for respondent)

John Rowell, Moorhead, Minnesota (pro se appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant husband challenges denial of his motion to stay and vacate and/or amend a Qualified Domestic Relations Order, the terms of which, he asserts, are inconsistent with the parties' agreement and the dissolution judgment. We affirm.

FACTS

The marital-termination agreement between appellant John Edwin Rowell (husband) and respondent Beverly Jean Lake Rowell (wife) was accepted by the district court and incorporated into the judgment of dissolution entered on June 5, 2009. Relevant to this appeal, the judgment provided that $23,900 "shall be transferred from [husband's] TSP [thrift savings plan] to [wife] pursuant to an appropriate order to create an equal division of the [parties'] defined contribution plans."

Neither the agreement nor the judgment stated the date on which the plans were valued, when the transfer should occur, or whether wife's award would be subject to gains and/or losses if the amount awarded to wife remained in the plan after the date on which wife was entitled to the funds. Husband asserts, and wife does not dispute, that they agreed to equal division of all their pension plans as valued on December 31, 2008, and that wife was entitled to the funds from the TSP on the date of the dissolution judgment—June 5, 2009.

On June 19, 2009, wife's attorney prepared a draft of a domestic-relations order (DRO)[1] providing for transfer of the TSP funds to wife, and e-mailed a copy of the DRO draft to husband's counsel for approval. The DRO draft provided, in relevant part:

> Pursuant to the decree of dissolution, [wife] is awarded $23,900 from [husband's TSP account] as of June 5, 2009 with that amount adjusted for losses or gains due to the performance of the plan from June 5, 2009 until the date of payment to her.

[1] Whether a DRO is a "qualified" DRO (or QDRO) is generally a determination made by a plan administrator based on whether the DRO complies with the terms of the plan documents for a particular pension fund. 29 U.S.C. § 1056(d)(3)(G)(II) (2006).

On the same day, husband's attorney e-mailed wife's attorney, stating that "[t]he orders[2] look fine." Husband was copied with this e-mail, which included the e-mail from wife's attorney to husband's attorney. The DRO was signed by the district court on June 26, 2009, and a certified copy was sent to the plan administrator on July 14, 2009.

By a letter dated November 17, 2009, the plan administrator informed wife that the DRO could not be "processed" under the current rules governing the TSP because federal regulations did not allow an adjustment for losses. The letter stated that, due to the large backlog of DROs waiting to be processed, an anticipated regulatory change that would permit adjustment for losses would take effect before this DRO would be processed, and the anticipated payment date would be in 2010. The record on appeal does not contain notice indicating when the plan administrator determined that the DRO was "qualified," but by letter dated December 23, 2009, referencing the language in the district court order, the plan administrator notified husband that, among other things, the payment to wife of $23,900, subject to earnings and losses, was scheduled to occur on February 24, 2010.

On the same day that husband received this letter, he moved the district court for an order to stay the DRO and, after hearing, to vacate and/or amend the DRO to be consistent with the dissolution judgment. Husband objected to any adjustment in the $23,900 amount awarded to wife in the dissolution judgment. Husband asserted that he

[2] The dissolution judgment provided for division of another pension plan that required a separate DRO not at issue in this appeal.

"certainly did not agree" that wife should benefit by a new regulation that was not in effect at the time of the judgment, which, husband asserted, resulted in a windfall to wife.

The regulation, which became effective on December 2, 2009, amended the federal regulations governing thrift-savings-plan accounts, in relevant part, "so that when a court order directs that a payment includes earnings, the Agency is able to make a payment which calculates the payee's award amount based on the current price of the shares . . . awarded." 74 Fed. Reg. 63,061, 63,061 (Dec. 2, 2009). The regulation provides that the agency will determine the number and composition of shares that the amount awarded would have purchased as of the effective date of the award, then multiply the price per share as of the payment date by the number and composition of shares comprising the payee's award amount as of the court order's effective date. *Id.* at 63,062.

Before the amendment, if a court order specified that earnings were to be awarded and no specific rate was provided, earnings were awarded using the Federal Retirement Thrift Investment Board's Government Securities Investment (G) Fund rate. *Id.* Husband's affidavit asserts that the applicable G Fund rate was "about 3% per annum." According to husband's calculations, which were not challenged by wife, under the terms of the DRO and the amendment, if payment were made to wife on the date of his motion (December 23, 2009), wife would be awarded $4,388 more than the $23,900 awarded in the dissolution judgment.

The district court denied husband's motion, concluding that husband and his attorney had approved unambiguous language in the DRO that provided for adjustment of

the amount awarded to wife for gains and losses from the date of the award to the date of payment, and the approval was not based on a mutual mistake. Husband appeals the denial of his motion.

D E C I S I O N

On appeal, husband argues that because the DRO impermissibly modified the terms of the dissolution judgment, the DRO was void and unenforceable, and the district court erred by concluding that husband, through counsel, waived objection to the DRO. Alternatively, husband argues that the district court should construe the language of the DRO under the plan regulations in effect when it was submitted and determine that the DRO was not "acceptable for processing by the [the plan]," thereby triggering the provision in the dissolution judgment that the parties would cooperate to obtain an amended DRO acceptable to the plan.

Husband's alternative arguments confuse the roles of the district court and the plan administrator. Under the Employee Retirement Income Security Act, the district court generally plays no role in determining whether a DRO is "qualified." The plan administrator qualifies a DRO solely on the basis of compliance with plan regulations, without regard to whether the DRO accurately reflects the terms of a dissolution decree. *See* 29 U.S.C. § 1056(d)(3)(C)–(D) (setting out requirements for determination of QDRO), (G)(II) (providing that plan administrator determines whether a DRO is a QDRO) (2006).

Here, the DRO was processed after the new regulation took effect, and the plan administrator determined the DRO to be qualified. We conclude that the district court is

without authority in the dissolution action to review or change this determination because the plan administrator is not a party to the dissolution action. *See* 29 U.S.C. § 1132(a)(1)(B) (2006) (allowing a participant or a beneficiary to bring a civil action in certain circumstances); *Langston v. Wilson McShane Corp*., 776 N.W.2d 684, 691 (Minn. 2009) (holding that a proposed alternate payee under a DRO is a beneficiary for purpose of invoking state court subject-matter jurisdiction in a declaratory-judgment action against the administrator of a pension plan to have a DRO declared qualified). We therefore decline to address husband's assertion that the district court should have determined that the DRO was not qualified or required the plan administrator to enforce regulations in effect before the DRO was determined to be qualified. *See* 29 U.S.C. § 1056(d)(3)(D)(i)(2006) (providing that a DRO meets the requirements for being determined "qualified" if the DRO "does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan").

We now address husband's assertions that the DRO is void because it does not reflect the terms of the dissolution judgment and that the district court erred by concluding that husband agreed to the new terms by failing to object to the DRO before it was submitted to the district court. Husband cites *Erickson v. Erickson*, 452 N.W.2d 253, 255–56 (Minn. App. 1990), for the proposition that a district court may not modify the unambiguous terms of a dissolution judgment. In *Erickson*, the dissolution judgment required husband, on the occurrence of a triggering event, to sell the parties' former homestead and, after the sale, to satisfy wife's lien for 50% of the net sale proceeds. 452 N.W.2d at 254. Husband failed to put the house on the market as required and, on wife's

motion, the district court fixed the amount of wife's lien prior to actual sale based on evidence of value contained in the dissolution record. *Id*. Husband appealed, asserting that the district court had impermissibly altered the judgment by establishing the value of wife's lien prior to sale. *Id*. at 255. This court rejected husband's argument, concluding that the district court's act "neither affected the parties' substantive rights nor altered the terms of the parties[']' original decree" because "[wife] receives the value of her lien interest and [husband] maintains his fee title in the property." *Id*. at 256.

We note that husband argues, and wife does not dispute, that they agreed to equal division of husband's TSP as valued on December 31, 2008, and that wife was entitled to the funds from the TSP on the date of the dissolution judgment—June 5, 2009. Apparently recognizing that wife's TSP payment would not occur until after June 5, 2009, the proposed DRO included a provision awarding wife "losses or gains due to the performance of the plan from June 5, 2009 until the date of payment." If a party's receipt of a property settlement is delayed, the district court is either to award interest on the property settlement or make findings explaining why interest is not appropriate. *Thomas v. Thomas*, 407 N.W.2d 124, 127 (Minn. App. 1987). Here, the judgment lacks findings explaining why wife is not entitled to interest on the delayed payment of her share of husband's TSP, apparently because the proposed DRO—which husband's attorney approved—awarded wife the change in value of the TSP between its award date and its payment date. Under these circumstances, we decline to replace the losses-and-gains component of wife's TSP payment with an interest component.

Furthermore, the record in this case reflects that distribution to wife was anticipated to occur on February 24, 2010. At the time of husband's motion and hearing on his motion, the amount that would actually be distributed to wife was unknown. Husband could only speculate that wife would receive more than $23,900 on the distribution date. The record contains only husband's assertions of the value of plan shares on the date of the judgment and on the date of his affidavit[3] to support his calculation that if wife were paid on the affidavit date she would receive $4,388[4] more than the judgment provided. Nothing in the record reflects whether wife actually realized husband's projected gain.

To prevail on appeal, an appellant must show not only error but prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993). Here, husband's remaining funds in the plan would have experienced the same rate of gain as the amount awarded to wife, and husband has failed to demonstrate that the balance remaining in the plan after actual distribution to wife is different than it would have been if $23,900 had been distributed to

[3] Wife did not challenge husband's calculations in the district court, but there is no foundation in his affidavit or the record for his assertions of the plan values and/or interest under the plan.

[4] We note that, using husband's calculations, this additional payment represents approximately three percent of the value of the plan on the date of the dissolution judgment. Common sense informs us that the amount involved is likely less than the cost of continued litigation. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (declining to remand for de minimis technical error).

wife on the day of the judgment. Therefore, even if the district court erred by concluding that husband agreed to be bound by the terms of the DRO, we are unable on this record to conclude that husband's substantive rights were affected such that he is entitled to relief on appeal. Because husband failed to meet his burden to show that he is entitled to relief, we cannot conclude that the district court erred or abused its discretion in denying his motion. *See Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001) (stating that the moving party bears the burden of proof in a motion to reopen a dissolution judgment).

Affirmed.