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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF ROBERTA A. MASON,)	Appeal from the Circuit Court of McHenry County.
)	
Petitioner-Appellee,)	
)	
and)	No. 03-DV-797
)	
WALTER D. MASON,)	Honorable
)	Gerald M. Zopp, Jr.,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in entering a second QDRO seven years after the dissolution judgment, where the initial QDRO, entered only four months after the dissolution judgment and with the exception of an agreed-upon erroneous fraction contained in that initial QDRO, conformed to the dissolution judgment. Reversed and remanded with directions.

¶ 2 Seven years after the dissolution of petitioner's, Roberta A. Mason's, and respondent's, Walter D. Mason's, marriage, petitioner moved to "modify" a qualified domestic relations order (QDRO) entered soon after the dissolution judgment to allegedly conform it to the judgment. The trial court granted the motion. Respondent appeals. We reverse and remand with directions.

¶ 3

I. BACKGROUND

¶ 4 The parties were married on September 7, 1968. On August 10, 2004, the trial court entered a judgment dissolving the marriage. At the time of dissolution, petitioner worked as a human resources manager, and respondent worked for GATX Corporation, a railcar leasing company, as director of labor relations. The dissolution judgment incorporated the parties' marital settlement agreement and further provided that the court would retain jurisdiction until the judgment's terms "have been fully complied with in all respects." As relevant here, the marital settlement agreement awarded petitioner "50% of [respondent's] defined benefit pension plan benefits that *accrued during the marriage*" (emphasis added), including the GATX defined benefit pension plan, in which respondent commenced participating on January 1, 1997. Further, the agreement stated: "Each party shall cooperate to effectuate the terms of this paragraph pursuant to [QDROs] for *** and [the GATX plan]."

¶ 5 On November 4, 2004, the trial court entered a QDRO, awarding petitioner a share of respondent's pension benefits under the "GATX Corporation Non-Contributory Pension Plan for Salaried Employees" (Plan). The QDRO "assigned to the Alternate Payee [*i.e.*, petitioner] an amount equal to the actuarial equivalent of fifty percent (50%) of the marital portion of the Participant's accrued benefit under the Plan *as of August 10, 2004*." (Emphasis added.) It further provided that the marital portion was to be calculated by multiplying "the Participant's accrued benefit" by the coverture fraction, *i.e.*, the total months of participant's participation in the Plan during the marriage divided by the total months of participant's participation in the Plan "as of the earlier of the date the Participant ceases accruing benefits under the Plan or the date the Alternate Payee commences her benefits." Finally, the QDRO provided that the court retained jurisdiction to

enter orders maintaining “the original intent of the parties” and as necessary to “enforce the assignment of benefits to the Alternate Payee as set forth herein[.]” Also on December 7, 2004, via a letter to petitioner, the QDRO was deemed qualified by the plan administrator.

¶ 6 In an April 14, 2011, letter from GATX’s employee benefits department, the company responded to petitioner’s request for details of its QDRO benefits calculation. The letter contained two examples calculating petitioner’s benefits. In the first example, the company calculated the coverture fraction’s numerator as 90 months (*i.e.*, respondent’s participation in the plan during the parties’ marriage) and the denominator as 142 months (*i.e.*, respondent’s plan participation through December 2008 (his normal retirement date¹)); the fraction equaled .6338. GATX calculated petitioner’s monthly benefit as follows: respondent’s accrued benefit as of August 10, 2004, the dissolution date, multiplied by the coverture fraction (.6338), multiplied by 50%; her benefit equaled \$404.05.

¶ 7 In the second example, the company calculated respondent’s benefit as of March 2011. In that example, the coverture fraction’s numerator was the same as in the first example, *i.e.*, 90 months, but the denominator was 169 months (reflecting respondent’s participation in the plan through March 2011); the fraction equaled .53254. Petitioner’s monthly benefit was calculated as follows: respondent’s accrued benefit as of August 10, 2004, multiplied by the coverture fraction (*i.e.*, .53254) multiplied by 50%; her benefit equaled \$339.49 per month. Thus, petitioner’s monthly benefit decreased the longer respondent worked for GATX (because, over time, the marriage term spanned a decreasing percentage of respondent’s employment term).

¹Respondent turned 65 on November 9, 2008. He continued to work at GATX past this date. Petitioner turned 65 in December 2010.

¶ 8 On June 10, 2011, seven years after the QDRO's entry and two months after receiving GATX's benefits calculation letter, petitioner moved to "modify" the November 4, 2004, QDRO to allegedly conform it to the dissolution judgment. (At this time, neither party had commenced receiving GATX pension payments.) Petitioner argued that "an error in the language" of the 2004 QDRO will result in her receiving "substantially less than 50% of the marital portion" of respondent's pension and that it "erroneously freezes" the benefit amount "based on the amount that would have been paid as of the date of the divorce." Further, she complained that the QDRO "applies a coverture fraction which leads to a reduction on the benefit amount for additional years after the divorce that [respondent] remains employed by GATX."

¶ 9 Petitioner argued that she was entitled to 50% of the marital percentage of each payment that respondent will receive, including any increases due to his employment *before and after* the parties' marriage. She asserted that her interest should be determined by the *Hunt* formula, derived from *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663 (1979) (describing the reserved jurisdiction approach to calculating benefit payments). Petitioner posited that, had respondent terminated his employment with GATX on the date of the parties' divorce in August 2004, petitioner would have received \$637 per month as of respondent's normal retirement date in 2008. She asserted that this amount did not account for any investment returns *after* the marriage dissolution date, as *Hunt* instructs. *Id.*

¶ 10 Respondent objected, arguing that: (1) petitioner was improperly seeking to *modify*, not merely *enforce*, the terms of a final judgment, including the marital settlement agreement, without filing a section 2-1401 motion (735 ILCS 5/2-1401 (West 2010)); (2) the dissolution judgment unambiguously freezes petitioner's share of respondent's GATX pension as of the date of their divorce; (3) alternatively, if the contract (*i.e.*, marital settlement agreement) is ambiguous, it should

be strictly construed against petitioner, as the drafter; (4) the waiver and release-of-errors provisions in the marital settlement agreement preclude modification; (5) petitioner's case law is factually distinguishable; and (6) the doctrine of *laches* applies to preclude relief for petitioner, where she did not object to the QDRO until seven years after its entry, including not in 2008 when respondent turned 65 and petitioner was first eligible to collect benefits and where respondent would be financially prejudiced by petitioner's suggested modification (including where he elected to work beyond age 65 with the belief that all increases in his monthly pension would be his alone).

¶ 11 The parties were deposed on October 17, 2011.² Respondent testified that he intended to retire at the end of 2011. He did not retire in 2008 (when he turned 65) because he was “having a good time” and because he was “trying to recoup” the costs of the divorce. His understanding and intent as to the 2004 QDRO was that petitioner's benefit would be *frozen* as of the date of the divorce and that any retirement benefit increases that accrued after the divorce would all be his. This was intentional because, in the divorce, petitioner received more than 50% of the marital assets. (Thus, he agreed that the portion of the 2004 QDRO formula—the coverture fraction—that results in the shrinking share was erroneous.)

¶ 12 Petitioner addressed at her deposition the timing of her motion to modify the 2004 QDRO. She testified that she received an earlier (than the April 2011) letter from GATX, dated June 30, 2007, concerning a Plan amendment effective as of that date. Two sections of the letter were highlighted. First, under a heading entitled “Purpose of this Notice,” the following language was highlighted: “This notice also applied to alternate payees under a Qualified Domestic Relations

²Due to respondent's illness, the parties stipulated that the court could proceed with a ruling on petitioner's motion based on the depositions, exhibits, and arguments received by the court.

Order if such order provides the alternate payee with an interest in the benefit of a participant described above.” Next, under a heading entitled “Overview,” which addressed an employee group that included respondent, the following language was highlighted: “[T]he factors used to calculate the adjustments to your retirement annuity benefit for commencement before age 65 will change.” Based on the highlighted portions of the letter, petitioner believed that she was not eligible to begin collecting benefits under the Plan until she reached age 65. She also testified that she did not believe that she could collect benefits until age 65 without a substantial reduction. Shortly after petitioner turned 65 in December 2010, she inquired with GATX (in February 2011) about collecting benefits. (This letter prompted the company’s April 2011 response.)

¶ 13 Petitioner saw a draft of the 2004 QDRO, which was prepared by her attorney, before entry of the dissolution judgment. (She also read the December 2004 GATX letter, notifying her that the 2004 QDRO was deemed qualified.) Addressing the marital settlement agreement, petitioner testified that her expectation was that she was entitled to “whatever portion of [respondent’s] pension I was due based on the time we were married, however that works in a pension.” She assumed that the amount would grow over time. Petitioner believes that the 2004 QDRO omits certain language and that this has a “detrimental effect” on her benefits. (She had previously become familiar with QDROs when, at her employment, she “forwarded” one to her company’s defined contribution plan administrator.)

¶ 14 Finally, petitioner presented a letter by Wendy Drefahl of WFA Econometrics Corporation, her proposed expert, wherein Drefahl opined that the *Hunt* formula was a “popular, well recognized source of” the definition of “ ‘ marital portion ’ ” or “ ‘ benefits accrued during the marriage ’ ” and that it was appropriate for deferred payments under the reserved jurisdiction approach as ordered in

this case. She further opined that the formula in the 2004 QDRO is not consistent with *Hunt* and provides for a “constantly decreasing amount payable to” petitioner and “significantly less than one half of the benefit attributable to service during the marriage.”

¶ 15 On March 6, 2012, the trial court granted petitioner’s motion to modify the QDRO. The court found that the initial QDRO was inconsistent with the dissolution judgment and, thereby, was invalid. The court determined that Illinois law *requires* use of the *Hunt* formula and that the dissolution judgment was not ambiguous. (The final point was undisputed by the parties). The court granted the motion to modify the QDRO to be consistent with *Hunt*. On March 13, 2012, over respondent’s objection, the court entered a modified QDRO for the GATX Plan. It provided that the alternate payee’s benefit would be calculated as “the actuarial equivalent of [50%] of the marital portion of the Participant’s accrued benefits under the Plan as of *the earlier of the date the Participant ceases accruing benefits under the Plan or the date the Alternate Payee commences her benefits.*” (Emphasis added.) (The foregoing emphasized language replaced the divorce date, *i.e.*, August 10, 2004, in the 2004 QDRO.) Respondent appeals.

¶ 16

II. ANALYSIS

¶ 17 The Employee Retirement Income Security Act of 1974 (ERISA) generally restricts the alienation of certain retirement benefits. See 29 U.S.C. § 1056(d)(1) (2012). However, an exception to this principle is that a state court, in a divorce or dissolution of marriage proceeding, may enter a QDRO assigning one spouse an interest (as marital property) in the other spouse’s retirement benefits. The QDRO must comply with specific requirements set forth in ERISA. See 29 U.S.C. § 1056(d)(3) (2012).

¶ 18 Respondent first argues that the trial court lacked jurisdiction to enter the modified QDRO because it failed to find, pursuant to section 2-1401 of the Code of Civil Procedure, a basis to revoke or modify the dissolution judgment. Respondent contends that petitioner's motion was an attempt to add provisions modifying the dissolution judgment. He urges that the trial court improperly deviated from the terms of the dissolution judgment pertaining to the distribution of his pension (where the court improperly interpreted the settlement agreement and did not properly apply the law). Petitioner responds that the trial court's order merely enforced the terms of the dissolution judgment and did not modify or change the terms of the judgment; thus, she did not need to bring a 2-1401 motion. She contends that the 2004 QDRO needed to be amended (to conform with the dissolution judgment) to reflect that the amount to which the coverture fraction should apply are the benefits as of the date of commencement of benefits rather than the dissolution date. For the following reasons, we conclude that, with the exception of the portion of the 2004 QDRO containing the shrinking share (which the parties agree was an error), the trial court exceeded its jurisdiction in entering the modified QDRO, thereby altering the 2004 QDRO, which was entered nearly contemporaneously with the dissolution judgment, and the dissolution judgment.

¶ 19 After 30 days from entry, a trial court loses jurisdiction to amend or modify a judgment. 735 ILCS 5/2-1203 (West 2010); *In re Marriage of Allen*, 343 Ill. App. 3d 410, 412-13 (2003). However, it retains indefinite jurisdiction to enforce the judgment. *Id.* at 413; *In re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010). Where a court amends a QDRO, for example, to conform it to the judgment, the amended order only enforces the provisions of the judgment and the court has jurisdiction to make the modifications. *Allen*, 343 Ill. App. 3d at 413; see also *Hall*, 404 Ill. App. 3d at 166 (trial court had jurisdiction to enter order enforcing judgment without first establishing

bases to vacate the judgment under section 2-1401). Whether a trial court has jurisdiction is a question of law subject to *de novo* review. *Allen*, 343 Ill. App. 3d at 412.

¶ 20 We begin with the settlement agreement that was incorporated into the dissolution judgment. A marital settlement agreement is construed as any other contract; the court must ascertain the parties' intent from the language of the agreement. *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). When the terms of the agreement are unambiguous, they must be given their plain and ordinary meaning. *In re Marriage of Sweders*, 296 Ill. App. 3d 919, 922 (1998). We review *de novo* an interpretation of a marital settlement agreement and a determination of whether the agreement's terms are ambiguous. *In re Marriage of Dundas*, 355 Ill. App. 3d 423, 426 (2005); *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 330 (2004). Further, we review for an abuse of discretion a court's choice of an apportionment method. *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236, 243 (1997).

¶ 21 Here, the marital settlement agreement awarded petitioner "50% of [respondent's] defined benefit pension plan benefits that *accrued during the marriage*" (emphasis added), including the GATX Plan. Both parties maintain that the dissolution judgment is not ambiguous. However, respondent contends that the phrase "accrued during the marriage" necessarily means those benefits that were earned during the marriage, but have not yet been paid; further, all benefits accrued or earned after the marriage necessarily have not been accrued during the marriage. He claims that the trial court erred in utilizing the *Hunt* formula, which allows the nonpensioner spouse to benefit from accruals or earnings through the pensioner's retirement date (*In re Marriage of Kehoe*, 2012 IL App (1st) 110644, ¶ 25). Petitioner, in turn, argues that the phrase "accrued during the marriage" mandates use of the *Hunt* formula, which the modified QDRO contains.

¶ 22 The reserved jurisdiction approach³, or the *Hunt* formula, is a commonly used method for dividing pensions' marital portions (*In re Marriage of Richardson*, 381 Ill. App. 3d 47, 52 (2008)), and it is "particularly appropriate if the [pension] interest has not vested" (*Hunt*, 78 Ill. App. 3d at 664). Under this approach, the marital portion of a pension benefit is calculated by dividing the total years of credited service during the marriage by the total years of credited service (the marital interest percentage) and multiplying this fraction by the monthly benefit. *Hunt*, 78 Ill. App. 3d at 663; *Richardson*, 381 Ill. App. 3d at 52. Again, it has been noted that this approach allows the nonpensioner spouse "to benefit from the entire growth in value between the date of dissolution and the date of [the pensioner's] retirement." *Kehoe*, 2012 IL App (1st) 110644, ¶ 25. "For the most part, Illinois courts have rejected the argument that nonpensioner spouses are only entitled to an amount determined by applying the proportionality formula to the pension their former spouses *would have* received had they retired upon dissolution rather than the pension they *actually* receive when they retire years after dissolution." *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 759 (2003). By postponing the pension, the parties share the risks that the employee-spouse will change jobs or die before retiring, which reduce the pension; thus, it is only equitable that the parties share in the benefits of unforeseen increases in the pension value.⁴ *Id.*

³We note that, "[t]he term 'reserved jurisdiction' as used in 'reserved jurisdiction approach' refers to a court's reservation of its jurisdiction to order payment of an interest in a pension benefit when the interest matures, not to its reservation of jurisdiction to decide the allocation of that pension benefit." *Richardson*, 381 Ill. App. 3d at 53 n.2.

⁴Also, the nonpensioner spouse, by postponing receipt of payments, foregoes the benefit of

¶ 23 Where the method of pension apportionment has not been determined earlier, the trial court has “discretion to consider the evidence before it and devise a method of its own.” *Wisniewski*, 286 Ill. App. 3d at 243. This method may include use of the *Hunt* formula. *Richardson*, 381 Ill. App. 3d at 52. However, as respondent emphasizes (and petitioner concedes), use of the *Hunt* formula at any point is not mandatory. *Wisniewski*, 286 Ill. App. 3d at 243. (On this point, the trial court misread the law.)

¶ 24 Respondent notes that, where the underlying judgment is based on a settlement agreement between the parties, they are free to allocate benefits in a manner *other* than what the trial court may have chosen (even if there is a great disparity in the benefits one former spouse receives as compared to the other spouse). Thus, a trial court is not free to use the *Hunt* formula for allocation where the parties have contractually agreed on another allocation method and jurisdiction has been reserved only to ensure payment.

¶ 25 Petitioner’s position is that her share of respondent’s GATX pension should be calculated by utilizing the *Hunt* formula. She maintains that the phrase “accrued during the marriage” does not unambiguously freeze her share of the benefits as of the dissolution date (*i.e.*, that the amount equals what would have been paid if respondent had retired on that date); rather, she argues that the amount of the benefits cannot be determined until respondent retires and the payments are apportioned between the years of marriage and the years after its dissolution. Petitioner urges that the modified QDRO accomplishes this task. She concedes that the dissolution judgment did not contain an explicit coverture fraction; however, she also maintains that the language in the settlement agreement

use of the assets at the time of dissolution. *Id.* Finally, “the higher-paid later years in an employee’s career would not be possible without the lower-paid earlier years during the marriage.” *Id.*

has been consistently interpreted in Illinois case law to incorporate the *Hunt* formula and that the trial court, by granting her motion and entering the modified QDRO, properly interpreted the dissolution judgment.

¶ 26 To assist in determining whether the pension allocation method was specified in the judgment and whether the 2004 QDRO conformed to the judgment, we review the case law. Respondent relies on *In re Marriage of Wenc*, 294 Ill. App. 3d 239 (1998). There, the marital settlement provision stated that the former wife would be entitled to receive “30% of all of [the former husband’s] vested, non-vested and/or accrued pension/retirement benefits accumulated as of the [dissolution date] at such time in the future *when and if* said benefits are paid to [the former husband]. All benefits accrued or accumulated by [the former husband] hereafter shall be his sole and exclusive property.” (Emphasis added.) The reviewing court held that the trial court erred in finding that the foregoing language unambiguously showed that the parties intended to divide the benefits based on the *Hunt* formula, where, without extrinsic evidence, the similarities between the language and *Hunt* were too limited to support this inference. *Id.* at 244. The parties’ use of the type of “ ‘if, as, and when’ ” language utilized in *Hunt*, the court noted, reflected only that the parties chose the reserved jurisdiction approach (by which it meant to determine the *timing* of the allocation) over a competing approach.⁵ “These ‘magic words’ imply that the pension will be divided when it

⁵Another approach is the present-value or immediate offset (or total offset) approach. *In re Marriage of Culp*, 399 Ill. App. 3d 542, 546-47 (2010); *In re Marriage of Peters*, 326 Ill. App. 3d 364, 370 (2001). Under this method, the trial court “determines the present value of the pension plan, awards the entire pension to the employed party, and awards the other party enough other marital property to offset the pension award.” *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 758

becomes payable rather than at the time of the dissolution, but they say nothing about *how* the payments will be divided.” (Emphasis in original.) *Id.* at 245. Further, the court noted that, the fact “that the court reserves *payment* until long after the dissolution judgment does not mean it reserves a decision on *how to calculate* the eventual payment. Depending on how the court exercises its discretion or what the parties have agreed, the dissolution judgment itself may dictate how the pension benefits will be allocated; however, the court may reserve this decision until the benefits are paid.” (Emphases added.) *Id.* at 244. The court determined that the language was ambiguous as to how the payment would be divided, and it remanded for the trial court to receive extrinsic evidence as to how the parties intended to allocate the former husband’s pension benefits. *Id.* at 245, 248.

¶ 27 In *Richardson*, upon which petitioner relies, the dissolution judgment (which incorporated the parties’ oral settlement agreement) awarded the respondent one-half of the petitioner’s defined benefit pension “ ‘as it has accrued’ ” from the date of marriage to the dissolution date. It was uncontested that the respondent would receive 50% of the marital portion of the petitioner’s pension; however, the parties disagreed on how to calculate the marital portion. After a hearing, the trial court determined that the value of the pension could not be determined at the time of the divorce and that the respondent received no offset toward the pension benefits at the time of the divorce. The trial court utilized the reserved jurisdiction approach.⁶ On appeal, the court determined that the dissolution judgment did not contain the calculation of the marital portion of the pension; it merely stated that the respondent was awarded one-half of the pension as it had accrued during the marriage.

(2003). “Often this method is impractical either because of valuation difficulties or because the couple lacks sufficient readily divisible assets to provide an offsetting property award.” *Id.*

⁶Twelve years after the dissolution judgment. *Richardson*, 381 Ill. App. 3d at 48.

Id. at 53. (The court did not address whether or not the judgment was ambiguous.) Accordingly, the court noted that, because the *method* of pension apportionment was not determined earlier, the court *had* discretion to consider the evidence and devise its own method. *Id.* The reviewing court affirmed the trial court's use of the reserved jurisdiction approach because the plan was of a type that made valuation difficult until retirement and because the petitioner's interest had not vested or matured at the time of the dissolution. *Id.* at 54.

¶ 28 Petitioner also relies on *Culp*. In that case, the parties' settlement agreement provided that the petitioner's public, defined benefit pension plan benefits were to be " 'equally divided' " as of the dissolution date. *Id.* at 543. It also specified that the value of the benefits as of the dissolution date was \$84,000. Because the petitioner was not near retirement upon dissolution, the trial court reserved jurisdiction to enter a Qualified Illinois Domestic Relations Order (QILDRO) (40 ILCS 5/1-119 (West 2000)), which is utilized instead of a QDRO with respect to certain Illinois public pension plans. Several years later, the respondent moved for entry of a QILDRO that named herself as the recipient of 50% of the marital portion of her former husband's monthly retirement benefit. The petitioner objected, arguing that the proper calculation was one half of his pension's value as of the date he filed his dissolution petition (*i.e.*, \$42,000). The trial court determined that the respondent's proposed QILDRO conformed to the parties' agreement and ordered the petitioner to sign it. The court found that, if the former wife's portion were fixed at \$42,000, there would have been no need for a QILDRO and that it would be unconscionable to find that the parties intended that she wait untold years for a fixed \$42,000 interest that denied her the benefit of increases in the value of the asset. Rather, in the trial court's view, the parties intended that the QILDRO be entered and that it contain the " 'customary formulaic approach.' " On appeal, the court upheld the trial court's

findings, concluding that the agreement merely stated an approximate value of the pension on the dissolution date and provided that the former wife receive 50% of the retirement plan pursuant to a future QILDRO. *Id.* at 548. The reference to a future QILDRO was further evidence of “the parties’ intent to ascertain the value of and equally divide the marital portion of the pension at a later date.” *Id.* The court stated that, when they agreed to postpone the division of the benefits, they shared the risks that the former husband might die or change jobs before retiring. *Id.* at 549. Thus, equity required that they shared the benefits of unforeseen increases in the pension’s value as well. *Id.*

¶ 29 The court also addressed the trial court’s use of the *Hunt* formula and held that the court did not abuse its discretion in doing so because: (1) at the time of the trial court’s order, the formula was a widely used method for dividing defined benefit pensions under the reserved jurisdiction approach (as further evidenced by the General Assembly’s later codification of the formula in the Illinois Pension Code’s provisions addressing QILDROs); and (2) the parties agreed to equally divide the marital portion of the pension via the reserved jurisdiction approach and did not include within their agreement any language that conflicted with the *Hunt* formula. *Id.* at 553.

¶ 30 *Kehoe* is also instructive. In that case, the dissolution judgment incorporated a marital settlement agreement and a QDRO. The parties agreed in the settlement agreement that the wife was entitled to one-half of the husband’s pension from the date of his employment to the parties’ separation date, commencing upon the husband’s retirement or termination of employment. The QDRO did not place a present value on the pension at the time of dissolution, nor did it or the settlement agreement estimate the pension’s value upon the parties’ separation. However, the QDRO did contain a formula calculating the former wife’s benefits: one-half of the marital portion

of the husband's monthly payment; the marital portion equaled the benefit amount multiplied by a fraction, the numerator of which was the months of marriage during which benefits were accumulated and the denominator of which was the total months during which benefits were accumulated prior to the dissolution date. Also, the QDRO specified that any increases in the husband's accrued benefits caused by contributions after the dissolution were not part of the marital portion and that the wife would not share in any such increases. Subsequently, the former wife learned that the pension plan, which was a public plan, paid benefits based only on a QILDRO (and not a QDRO). She moved for entry of a QILDRO, proposing that her benefits be calculated by dividing the husband's pension as of the date it went into pay status. The husband objected, arguing that the wife was entitled the one-half of the pension from the date of marriage until the dissolution date. The trial court denied the wife's motion and ordered the husband to pay the wife 50% of his pension as of the date of separation.

¶ 31 On appeal, the court affirmed, concluding that the judgment (*i.e.*, the marital settlement agreement and QDRO) contained a clear method of calculating and apportioning the pension: one-half of the value of the husband's pension from the date of his employment to the separation date. *Id.* ¶¶ 20-21. The court noted that the fact that the QDRO itself, which contained a detailed formula, was incorporated into the dissolution judgment "showed that the judgment is not 'silent' as to how the pension should be divided and what portion of the pension benefit is marital." *Id.* ¶ 22. The reviewing court also noted that the increased benefits provision of the QDRO, which excluded from the marital portion any increases in the husband's accrued benefits due to contributions after the dissolution date, showed that the dissolution judgment included a method of dividing the pension. *Id.* ¶ 24. Further, this provision also precluded application of the *Hunt* formula, which conflicted

with it. *Id.* ¶ 25. Thus, the wife’s pension benefits could only be calculated based on the pension’s value at dissolution, not at the time of the husband’s retirement. *Id.* ¶ 26.

¶ 32 The *Kehoe* court distinguished *Richardson* and *Culp*. First, the court concluded that *Richardson* was relevant only in cases where the dissolution judgment was silent on the calculation of the marital portion of pension benefits. *Id.* ¶ 30 (noting that the *Richardson* judgment stated only that the former wife was awarded one-half of the marital portion of the pension and did *not* state *how* the portion would be calculated). The *Kehoe* court distinguished *Culp* on the same basis: the settlement agreement in that case contained no specific language instructing the trial court as to how to calculate the pension, other than that it had to do so equally. *Id.* Second, the court found *Richardson* inapposite because, in that case, the judgment expressly stated that the court retained jurisdiction to enter a later QDRO. *Id.* ¶ 32. In *Kehoe*, the QDRO was incorporated into the judgment. *Id.* Thus, *Richardson* did not apply and the trial court did not have discretion to decide on an apportionment method where the judgment contained one in the parties’ QDRO. *Id.* Accordingly the court affirmed and remanded for the entry of a QILDRO containing the terms of the QDRO. *Id.* ¶ 38.

¶ 33 Although the foregoing cases do not present the exact scenario presented here (most notably, they do not involve a second domestic relations order), they do contain some general guidelines. First, *Kehoe* instructs that, where a settlement agreement and QDRO that are incorporated into the dissolution judgment contain a formula to calculate and apportion pension benefits, the trial court has no discretion to decide how to allocate the benefits. *Kehoe*, 2012 IL App (1st) 110644, ¶¶ 20-22. That court stated: “The detail of the QDRO’s language regarding the calculation of [respondent’s] pension and, even more notably, the very act of incorporating a completed QDRO into the

dissolution judgment show that the judgment is not ‘silent’ as to how the pension should be divided and what portion of the pension benefit is marital.” *Id.* ¶ 22. Thus, the timing of the QDRO is a critical factor.

¶ 34 Here, the QDRO’s entry was nearly contemporaneous to the entry of the judgment: the dissolution judgment was entered in August 2004, and the QDRO was entered in November 2004.⁷ The dissolution judgment here awarded petitioner “50% of [respondent’s] defined benefit pension plan benefits *that accrued during the marriage.*” (Emphasis added.)

¶ 35 Second, we note that *Wenc* instructs that, even with the type of “‘if, as, and when’” language used in *Hunt*, a settlement provision specifying that the former wife would receive a certain percentage of the pensioner’s benefits as of the dissolution date, without more, did not unambiguously show that the parties intended to divide the benefits based on the *Hunt* formula. *Wenc*, 294 Ill. App. 3d at 244. Indeed, here, petitioner concedes that the dissolution judgment does not contain a coverture fraction, which is part of the *Hunt* formula that she contends must be read into (indeed, is unambiguously contained in) the judgment. (Further, both parties agree that the coverture fraction in the 2004 QDRO is erroneous.) Thus, pursuant to *Wenc*, we reject petitioner’s argument that the judgment unambiguously mandates use of the *Hunt* formula.⁸

⁷For this reason, *Richardson*, which involved a judgment containing language similar to the present case, but where the trial court adopted the reserved jurisdiction approach 12 years after the dissolution judgment, is distinguishable. *Richardson*, 381 Ill. App. 3d at 48.

⁸The *Wenc* court also held that the language in that case was ambiguous and remanded for the trial court to receive extrinsic evidence. *Id.* at 245, 248. The court did so, we believe, because the settlement contained the *Hunt*-like magic words, but also stated that all benefits accrued by the

¶ 36 Next, we look to the 2004 QDRO. The parties agree that the 2004 QDRO's provision that results in petitioner's portion becoming smaller over time (*i.e.*, the shrinking share) is an error. According to respondent, the "obvious solution" here is to enter a QDRO that contains only the language of the judgment," which the parties agree is not ambiguous. As respondent explains, the mere elimination of the coverture fraction would correct this error to conform the 2004 QDRO to the judgment (*i.e.*, the equation should read only that petitioner will receive one-half of respondent's pension benefits that accrued as of August 10, 2004). This would result in petitioner receiving one-half of the amount that would have been paid had respondent stopped working as of the dissolution date. Respondent maintains that the judgment precludes petitioner from receiving a portion of the benefits accrued after the marriage and that her share was frozen at the time of the divorce. He argues that the modified QDRO expanded petitioner's entitlement (and thus modified the dissolution judgment). Respondent complains that, in exchange for half of respondent's pension that accrued as of the dissolution date, petitioner bargained for and received in the settlement more than 50% of the marital assets, including real estate, maintenance, and one-half of another retirement plan. Further, respondent contends that no formula is contained in the settlement agreement because it is not needed in order to determine one-half of the pension benefits that had accrued as of the divorce date. He notes that the GATX administrator, in the April 2011 letter, was able to calculate 50% of respondent's benefits as of the dissolution date. Again, he maintains that, if the coverture fraction language is eliminated from the 2004 QDRO, the order would be modified in a way that is consistent with the dissolution judgment and would eliminate the declining share over time.

pensioner "hereafter shall be his sole and exclusive property," a provision that appears to conflict with *Hunt*.

¶ 37 We agree with respondent that the modified QDRO constituted an impermissible amendment of the judgment. Again, the dissolution judgment here awarded petitioner “50% of [respondent’s] defined benefit pension plan benefits *that accrued during the marriage.*” (Emphasis added.) The 2004 QDRO (entered three months after the dissolution judgment), which was entered almost contemporaneously to the judgment, assigned to petitioner 50% of the marital portion of respondent’s “accrued benefit under the Plan *as of August 10, 2004[,]*” (the dissolution date). It further provided that the marital portion was to be calculated by multiplying “the Participant’s accrued benefit” by the coverture fraction, *i.e.*, the total months of respondent’s participation in the Plan during the marriage divided by his total months of participation in the Plan “as of the earlier of the date the Participant ceases accruing benefits under the Plan or the date the Alternate Payee commences her benefits.” (The coverture fraction results in the erroneous shrinking share.) Petitioner contends that the only proper reading of the dissolution judgment is that the benefits assigned to her should be: 50% of the marital portion of respondent’s benefits under the Plan *as of the earlier of the date he ceases accruing benefits or the date petitioner commences receiving benefits*, not as of the dissolution date (as the 2004 QDRO states). However, the case law does not mandate only this reading. We conclude that, with the exception of the language that results in petitioner’s benefits decreasing over time, the language in the 2004 QDRO does not conflict with the dissolution judgment. The order, consistent with the dissolution judgment, references that respondent’s accrued benefit is to be calculated as of the dissolution date. In our view, the trial court’s approach was too broad, essentially rewrote the entire key QDRO equation, and resulted in granting petitioner a second attempt at fashioning an order to her liking. The trial court should have taken a narrow approach and corrected only the undisputed error of the shrinking share. The

remaining language of the QDRO is consistent with the language in the settlement agreement. Again, we emphasize that the 2004 QDRO, with the exception of the portion creating the shrinking share, contains language that is nearly identical to that in the dissolution judgment; thus, it necessarily conforms to the judgment. Because the (corrected) 2004 QDRO conforms to the marital settlement agreement incorporated into the judgment (and happened to be nearly contemporaneously entered to it, was prepared by petitioner's attorney, and was reviewed by petitioner before the judgment was entered), this obviated the need for a second QDRO that did anything more than to correct the agreed-upon error in the 2004 QDRO.

¶ 38 In sum, the trial court exceeded its jurisdiction by modifying (and not merely enforcing) the dissolution judgment.

¶ 39

III. CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of McHenry County is reversed and the cause is remanded for the trial court to vacate the modified QDRO and enter a QDRO awarding petitioner one-half of respondent's pension benefits that accrued as of August 10, 2004.

¶ 41 Reversed and remanded with directions.