2019 IL App (1st) 190337-U

SIXTH DIVISION
September 27, 2019

No. 1-19-0337



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| In re Marriage of McHale: | ) | Appeal from the |
| | ) | Circuit Court of |
| TRACY M. MCHALE, | ) | Cook County. |
| | ) | |
| Petitioner-Appellee, | ) | |
| | ) | |
| and | ) | No. 13 D5 30015 |
| | ) | |
| SHAWN T. MCHALE, deceased, by his | ) | |
| Administrator and PALOS FIREFIGHTERS | ) | |
| PENSION BOARD OF TRUSTEES, | ) | Honorable |
| | ) | David E. Harascz, |
| Respondents-Appellants. | ) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Mikva and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 ***Held***: The judgment of the circuit court is affirmed where petitioner timely added the Board as a party to the proceedings on her motion to vacate, and the court's decision to vacate the judgment of dissolution of marriage was not an abuse of discretion.

¶ 2 This matter previously came before this court for review of the trial court's order granting petitioner, Tracy M. McHale's, motion to vacate the judgment of dissolution of marriage on the grounds that it would be unconscionable and inequitable not to do so. This court vacated the trial

court's order and remanded for consideration of whether petitioner complied with section 4-114(g) of the Illinois Pension Code (Pension Code), and for appointment of a guardian for the minor children. See *In re Marriage of McHale*, 2016 IL App (1st) 160154-U (unpublished order pursuant to Supreme Court Rule 23). After remand, the trial court again granted petitioner's motion to vacate the dissolution judgment. In this appeal, respondents Shawn T. McHale, deceased, by his administrator, and the Palos Fire Protection Fund Board of Trustees (collectively "the Board"), contend (1) petitioner's motion to vacate was time-barred where she failed to add the Board as a party within two years after the judgment of dissolution was entered; (2) petitioner had no standing to pursue her motion where she failed to appeal the Board's order of December 7, 2015, and accepted payments of benefits on behalf of her children and the estate; (3) alternatively, the trial court erred in granting petitioner's motion to vacate; and (4) the court erred in finding no conflict of interest between the estate and the executor, Shawn T. McHale, Jr. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 On January 28, 2019, the circuit court granted petitioner's motion to vacate the judgment for dissolution of marriage. The Board filed a notice of appeal on February 20, 2019. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb.1, 1994), and 303 (eff. July 1, 2017), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 On January 3, 2013, petitioner filed a petition for dissolution of marriage after 19 years of marriage to Shawn T. McHale. At the time, Shawn was employed by the Palos Heights Fire Protection District as a firefighter and vested in its pension fund. Both parties had the benefit of counsel and on November 13, 2013, the trial court entered a judgment for dissolution of marriage. The judgment included a Qualified Illinois Domestic Relations Order (QILDRO),

which granted petitioner 50% of Shawn's retirement pension benefits, with payments terminating upon the death of either petitioner or Shawn, whichever occurred first. The present value of the marital portion belonging to petitioner was calculated by WFA Econometrics Corporation to be over $700,000, based on the estimated death of Shawn at 79.89 years old. Petitioner had no retirement accounts of significance in her name. Petitioner acknowledged that under the dissolution of marriage agreement, marital property was divided equally between the parties.

¶ 7 On June 10, 2015, before collecting any pension, Shawn died unexpectedly of a heart attack at the age of 53. Under the terms of the QILDRO and the Pension Code, petitioner was not entitled to any portion of Shawn's pension. On November 3, 2015, petitioner filed a motion to vacate the judgment for dissolution of marriage pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). In her motion, petitioner stated that she recently learned of her right to vacate the judgment of dissolution and by so doing, she could receive her marital portion of Shawn's pension. On November 24, 2015, petitioner filed a motion to add the Board as a party to the proceeding, which the trial court granted. The Board was served with notice of the motion to vacate on December 15, 2015.

¶ 8 Meanwhile, on December 7, 2015, "[p]ursuant to the requirements of the Illinois department of Insurance," the Board issued an order for payment of $59,617.14 to the estate. The check noted that the payment was for "McHale contribution refund." That same day, the Board also issued two survivor benefit checks, each in the amount of $12,332.52, to Shawn's and petitioner's minor children. Petitioner stated that someone from the fire department handed her the checks in an envelope "sometime in December" of 2015. She had received a phone call asking her to pick up the checks. Petitioner did not request the checks, nor did she know whether Shawn's estate asked for them. Petitioner believed that the amounts given to her children represented the pension benefit that "they were entitled to."

¶ 9 In response to petitioner's motion to vacate, the Board argued that (1) petitioner's motion was time barred under section 4-114(g) of the Pension Code, (2) she had no meritorious claim, nor did she exercise due diligence in presenting her claim, (3) she waived her claim that she was entitled to a pension, (4) she failed to file an appeal for administrative review, and (5) a conflict of interest exists between Shawn's estate and the executor of the estate. On January 28, 2019, after consideration of the parties' arguments, the trial court granted petitioner's motion. The court found that (1) no conflict of interest existed, and (2) "the petitioner has established sufficient grounds to vacate the Judgment for Dissolution of Marriage." It ordered that the dissolution judgment and the QUILDRO "are vacated pursuant to 2-1401." The Board timely filed this appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, the Board first argues that petitioner's motion to vacate was time-barred because she failed to add the Board as a party within two years of the dissolution judgment as required by the Pension Code. The interpretation of a statute is a question of law subject to *de novo* review. *Ryan v. Board of Trustees of General Assembly Retirement System*, 236 Ill. 2d 315, 319 (2010). The primary goal in interpreting a statute is to ascertain and give effect to the legislature's intent. *Id*. The best indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *In re D.F.*, 208 Ill. 2d 223, 229 (2003). If statutory language is ambiguous, we may look to other sources in determining legislative intent. *People v. Ross*, 206 Ill. 2d 403, 414 (2003). However, "[w]here the statutory language is clear and unambiguous, we will enforce it as written and will not read into it exceptions, conditions, or limitations that the legislature did not express." *Ryan*, 236 Ill. 2d at 319.

¶ 12 Section 4-114(a) of the Pension Code provides for payment of a pension to survivors in the event of a firefighter's death, including payments to "the surviving spouse" and "if there is a

surviving spouse, to the guardian of any minor child or children." 40 ILCS 5/4-114(a)(1) (West 2016). In the case where there has been a dissolution of marriage, section 4-114(g) provides:

> "If a judgment of dissolution of marriage between a firefighter and spouse is judicially set aside subsequent to the firefighter's death, the surviving spouse is eligible for the pension provided in paragraph (a) only if the judicial proceedings are filed within 2 years after the date of the dissolution of marriage and within one year after the firefighter's death and the board is made a party to the proceedings." 40 ILCS 5/4-114(g) (West 2014).

¶ 13 Here, the judgment of dissolution of marriage was entered on November 13, 2013. Shawn died on June 10, 2015, and petitioner filed her motion to vacate on November 3, 2015, less than two years after the dissolution judgment and within a year of Shawn's death. Petitioner added the Board as a party on November 24, 2015. The Board argues that since petitioner added the Board more than two years after the dissolution judgment was entered, her motion to vacate was time-barred under section 4-114(g).

¶ 14 We disagree. It is true that the use of the conjunctive "and" in section 4-114(g) indicates the legislature's intent that all requirements be met for the provision to apply. *In re M.M.*, 2016 IL 119932, ¶ 21. However, the use of "and" in this provision does not necessarily mean the two year time limit also applies to the requirement that the Board be made a party to the proceedings. Filing a claim to initiate judicial proceedings is a separate issue from making the Board a party to the proceedings. Since the time limit language directly follows the reference to filing of judicial proceedings, and the requirement that the Board be made a party has no such corresponding time limit, a plain reading of section 4-114(g) dictates that the restriction applies only to the time in which judicial proceedings must be filed.

¶ 15 If we were to read a time restriction on when the Board must be made a party, based on the language of section 4-114(g), the only interpretation that makes sense is to apply both the two-year and one-year limits stated in the provision. However, if the legislature intended for the

time limits to apply to when the Board must be made a party, as well as to the filing of judicial proceedings, the provision would read differently. Section 4-114(g) would state that the surviving spouse is eligible for the pension only if the judicial proceedings are filed, and the Board is made a party to the proceedings, "within 2 years after the date of the dissolution of marriage and within one year after the firefighter's death." 40 ILCS 5/4-114(g) (West 2016). By placing the requirement that "the board is made a party to the proceedings" after language restricting the time in which proceedings must be filed, the legislature intended only that the Board be made a party to the proceedings and no more. This court cannot, "under the guise of construction, supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise *** depart from the plain meaning of the language employed by the statute." *In re County Treasurer and Ex-Officio Collector of Cook County*, 323 Ill. App. 3d 1044, 1049 (2001).

¶ 16 The Board argues that this interpretation would "place no time limit upon the suit as it pertains to the Board." Any motion to add the Board as a party, however, must still comply with the Code. Section 2-616(a) of the Code provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant." 735 ILCS 5/2-616(a) (West 2016). Accordingly, the Board must be made a party at any time before final judgment. Since petitioner filed her motion to vacate "within 2 years after the date of the dissolution of marriage and within one year after [Shawn's] death and the board [was] made a party to the proceedings" before final judgment, she satisfied the requirements of section 4-114(g). 40 ILCS 5/4-114(g) (West 2016).

¶ 17 The Board next argues that the trial court should have dismissed petitioner's motion to vacate where petitioner failed to appeal the Board's order of December 7, 2015, as required under administrative review law. The Board did issue an order on December 7, 2015, authorizing

the payment of a contribution refund to Shawn's estate and benefit payments to his minor children. Petitioner, however, does not challenge these payments. Instead, her motion to vacate asks the trial court to set aside the dissolution judgment it had previously entered where the terms of the settlement agreement are unconscionable. A motion to vacate a dissolution judgment is not requesting review of an administrative decision, but rather is a claim properly brought before the trial court. See 750 ILCS 5/502(b), (c) (West 2016). Administrative review law has no application here.

¶ 18 The Board also argues that petitioner has no standing to pursue her motion because the Board issued a contribution refund to Shawn's estate and he is no longer a member of the pension fund. As support, the Board cites sections 4-118.1 and 4-116 of the Pension Code. Petitioner, however, has not yet applied to the Board for a pension benefit. Since there was a judgment dissolving her marriage to Shawn, she must first obtain a court order vacating the dissolution judgment before she is even eligible for pension payments under the Pension Code. 40 ILCS 5/4-114(g) (West 2016). The only issue before this court is whether the trial court properly granted petitioner's motion to vacate the judgment of dissolution of marriage, and in doing so whether petitioner can be considered a surviving spouse eligible for a pension payment pursuant to section 4-114(g). To the extent that the Board's standing argument concerns whether the facts in this case support an actual pension payment to petitioner, that question is not properly before us at this time.

¶ 19 The Board argues that if we find petitioner's motion to vacate timely, and that she had standing to pursue it, the trial court nonetheless erred in granting the motion. Petitioner filed her motion to vacate pursuant to section 2-1401 of the Code. Section 2-1401 sets forth a procedure by which the trial court may vacate final orders and judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2016). Relief under section 2-1401 requires petitioner to set

forth specific factual allegations showing (1) the existence of a meritorious claim, (2) due diligence in presenting the claim to the circuit court, and (3) due diligence in filing the 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). A petitioner may use section 2-1401 to set aside a settlement agreement that is unconscionable or was entered into through duress, coercion, or fraud. *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 17. A section 2-1401 petition "is used to bring facts to the attention of the trial court which, if known at the time of judgment, would have precluded the entry of the judgment." *Id.* Whether to grant a 2-1401 petition is a determination that "lies within the sound discretion of the circuit court, depending upon the facts and equities presented." *Airoom*, 114 Ill. 2d at 221. "The trial court abuses its discretion when the ruling is arbitrary or unreasonable or no reasonable person would agree with the position taken by the court." *Citibank, N.A. v. McGladrey and Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13.

¶ 20 The Board argues that petitioner does not have a meritorious claim where she did not discover new facts regarding Shawn's health that he had hidden from her, and she was aware of the fact that when Shawn died she would no longer receive pension payments under the QILDRO. The Board concludes that petitioner has not shown new evidence which, if known at the time of the dissolution judgment, would have precluded entry of the judgment.

¶ 21 Petitioner's motion, however, did state new evidence not known to the parties at the time of judgment. The new evidence was Shawn's unexpected death less than two years after the judgment for dissolution of marriage was entered. Petitioner stated that at the time of judgment, Shawn was 51 years old and employed as a firefighter. She had no significant retirement accounts in her name and the parties intended, through the QILDRO, to grant petitioner "half of the marital value" of Shawn's pension. Both petitioner and Shawn believed he was in good

health. Due to Shawn's unexpected death at the age of 53, petitioner now receives nothing under the QILDRO.

¶ 22 "[I]n many cases pension benefits may constitute one of the most important items of property acquired in a marriage of long duration; in some perhaps, it may be the only asset of any significant value." *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 291, 304 (2000). If petitioner had known that Shawn would die less than two years later, and therefore she would receive no portion of the marital pension, it is unlikely she would have agreed to the QILDRO. The trial court determined as much when it first granted petitioner's motion on the grounds that it would be unconscionable and inequitable not to vacate the judgment. An unconscionable bargain is one that no reasonable person would make, and which no fair and honest person would accept. *In re Marriage of Richardson*, 237 Ill. App. 3d 1067, 1080 (1992). We cannot say that the trial court's determination was arbitrary or unreasonable or no reasonable person would agree with the court's position.

¶ 23 Petitioner was also diligent in presenting her claim to the court and filing her petition after Shawn's death. Shawn died on June 10, 2015, and petitioner filed her motion to vacate pursuant to section 2-1401 on November 3, 2015, less than five months later. There is no question that she filed within the time allowed by section 2-1401. See 735 ILCS 5/2-1401(c) (West 2016) (a petition must be filed no more than two years after entry of the challenged judgment). We find that the trial court did not abuse its discretion in granting petitioner's motion to vacate pursuant to section 2-1401 of the Code.

¶ 24 The Board argues that granting petitioner's motion to vacate so she may be eligible to receive pension payments would effectively grant a windfall because Shawn died without receiving any pension benefits. Upon dissolution of the marriage, the parties agreed that the marital assets should be divided equally. Therefore, petitioner should receive nothing, "exactly

the same pension benefit that [Shawn] received." The Board contends that it would be against public policy to allow petitioner to take advantage of a taxpayer funded pension to obtain more money in this situation. It argues that the dissolution judgment should be vacated only if evidence exists that Shawn "concealed his assets or the fact that he was in poor health [in order to] keep petitioner from obtaining pension benefits."

¶ 25 We agree that the parties intended to divide their marital property equally upon dissolution of the marriage. However, they did not intend for petitioner to receive none of the value of the marital pension. They assumed Shawn was in good health and would live to about 80 years of age, and petitioner would receive pension benefits in accordance with the QILDRO. Petitioner's expectation that she receive what the parties bargained for is not "seeking a windfall." Furthermore, by enacting section 4-114(g), the legislature intended for certain ex-spouses to be considered surviving spouses eligible for pension benefits. The provision does not limit situations in which it applies to those involving fraud or the concealment of facts. "We must interpret and apply statutes in the manner in which they are written and cannot rewrite them to make them consistent with our own idea of orderliness and public policy." *Schultz v. Illinois Farmers Insurance Company*, 237 Ill. 2d 391, 406 (2010).

¶ 26 The Board's final contention is that the trial court erred in finding no conflict of interest where the executor of Shawn's estate was his son, Shawn McHale, Jr. The Board contends that the executor breached his fiduciary duty to the estate by not opposing petitioner's motion to vacate the dissolution judgment. It merely argues that Shawn McHale, Jr., "is only representing his interests and the interests of his mother, and not the interests of the Estate." The Board's conclusory arguments, with no citations to relevant authority, violate Rule 341(h)(7) (eff. May 25, 2018), and therefore do not merit consideration on appeal. *Wells Fargo Bank, N.A. v. Sanders*, 2015 IL App (1st) 141272, ¶ 43.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.