

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002197-MR

PAUL E. EIDEN, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE KEVIN L. GARVEY, JUDGE  
ACTION NO. 99-FC-006777

SAUNDRA L. EIDEN

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND COMBS, JUDGES.

BARBER, JUDGE: Appellant, Paul E. Eiden, Jr. ("Paul"), seeks review of orders of the Jefferson Family Court regarding the entry of a Qualified Domestic Relations Order ("QDRO") contrary to the terms agreed upon in the parties Separation Agreement. We reverse and remand.

Paul and the Appellee, Sandra L. Eiden ("Sandy"), were married on September 24, 1965. On June 13, 2000, the Jefferson Family Court entered a decree of dissolution,

incorporating by reference the parties' June 9, 2000 Agreement.

The Agreement provides, in pertinent part:

5. RETIREMENT FUNDS

*The parties further agree that that they will further divide one-half (1/2) equally the funds contained in the savings and investment plan in Paul's name with his former employer, said plan having a value of approximately \$133,000.00, subject to fluctuation based upon the value of the stock in the plan.<sup>1</sup> Said funds shall forthwith be divided one-half (1/2) equally between the parties as of the date of the entry of the final decree of dissolution of marriage in this action and Sandy's interest shall be transferred to her by way of a Qualified Domestic Relations Order, plus her pro-rata share of any earnings or minus her pro-rata share of any losses which may be experienced after the date of the entry of said decree of dissolution of marriage until said funds are actually transferred into a separate account for Sandy.*

Sandy shall assume and pay any taxes which may be incurred on her share of said saving and investment plan funds, and she shall indemnify and hold Paul harmless thereon; and Paul shall assume and pay any taxes which may be incurred on his share of said savings and investment plan, and he shall indemnify and hold Sandy harmless thereon. It is not anticipated that there will be any taxes incurred by either party upon the entry and implementation of the aforesaid Qualified Domestic Relations Order.

With regard to the Paul's [sic] pension plan which has been in pay status since his retirement in approximately December 1996, Sandy shall be entitled to received [sic] one-half (1/2) of said monthly vested accrued retirement benefits, and her interest in said benefits shall be set aside

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<sup>1</sup> According to Paul's disclosure statement the value was \$133,237.29 on September 8, 1999; according to correspondence from Dupont, the value was \$105,738.27 on June 13, 2000, the date the Decree was entered.

in the form of a Qualified Domestic Relations Order which shall be entered forthwith. Sandy shall assume and pay any taxes which may be incurred on her share of the monthly vested accrued retirement benefits under the pension plan, and she shall indemnify and hold Paul harmless thereon; and Paul shall assume and pay any taxes which may be incurred on his shares of the monthly vested accrued retirement benefits under the pension plan, and she shall indemnify and hold Paul harmless thereon; and Paul shall assume and pay any taxes which may be incurred on his share of the monthly vested accrued retirement benefits under his pension plan, and he shall indemnify and hold Sandy harmless thereon. [emphasis added]

Paragraph 11 provides that "[T]his Agreement shall not be subject to modification at a later time by any Court, except by written agreement signed by both parties."

On October 5, 2000, Sandy filed a motion to enter a QDRO awarding her 50% of Paul's monthly benefits in the Dupont Pension and Retirement Plan, in accordance with the parties' Agreement; however, Sandy did not seek transfer of her interest in the savings and investment plan ("SIP") at that time. On October 10, 2000, the trial court entered that order.

On April 19, 2001, Sandy filed a motion for Paul "to show cause why he should not be held in contempt for failure to abide by the parties' Agreement . . . entered by this Court a year ago." Insofar as it pertains to the issue on appeal, Sandy asserted that:

4. Lastly, pursuant to page 3 and 4 of the Agreement, the Respondent [Paul] is to divide his

savings and investment plan with his former employer, one-half equally with the Petitioner [Sandy], said plan having had a value of approximately \$133,000. Counsel for Petitioner was in the process of having a Qualified Domestic Relations Order entered for her share in the division of this plan, however it has only recently been learned that the value of the plan on the date the decree was entered was approximately \$105,000.00.

Sandy contended that Paul "may have removed a portion of this money" because a "drop of \$28,000.00 seems too large for just a market fluctuation reduction." By order entered April 24, 2001, the court assigned the matter for a hearing.

On May 24, 2001, the trial court entered an order, which provides, in pertinent part:

The Petitioner [Sandy] has required an explanation about the loss in value of the Dupont savings and retirement account. The parties' Agreement indicates the approximate value was \$133,000 at the time of the agreement and the Petitioner has indicated recent statements give a present value of approximately \$105,000. The Respondent [Paul] testified that the value is tied to market performance and the recent downturn in the stock market accounts for part of the reduction in value. The Respondent also indicated that on December 18, 2000, he made a withdrawal of \$3,831.81 and on February 28, 2001, he made a withdrawal of \$6,500.00.

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IT IS FURTHER ORDERED THAT neither party shall make a withdrawal from the Dupont savings and retirement account unless there is a executed [sic] written Agreed Order between the parties or a specific court Order allowing such withdrawal.

IT IS FURTHER ORDERED that a Qualified Domestic Relations Order be prepared and submitted to the Court which divides the Dupont savings and retirement account according to the Agreement. Both parties are ordered to give their full cooperation in obtaining information necessary to prepare this QDRO. This QDRO shall be submitted to the Court for approval no later than June 14, 2001.

On July 26, 2001, Sandy filed a motion to enter a Qualified Domestic Relations Order-SIP. By way of supporting memorandum, Sandy filed information from Dupont that any QDRO must specify a dollar amount to be paid to the Alternate Payee; further, that Dupont cannot block a participant's SIP account prior to receipt of a final, signed court order.

On September 19, 2001, the court entered an order on Sandy's motion, which provides in pertinent part:

The Court . . . hereby **SUSTAINS** the Petitioner's motion and enters the attached Qualified Domestic Relations Order.

The Court finds that the delay in entry of this Order was due in part to the Respondent's action by withdrawing funds from this account totaling \$10,332.00. The Court finds that the Petitioner was justified in demanding an accounting of the plan due to the drop in the value of the plan from the date of their Agreement which was in part due to the Respondent's withdrawals.<sup>2</sup> Further, the Court finds that any drop in value of this account due to the stock market should be borne by the Respondent as he had complete control over this account and was able to access

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<sup>2</sup> The drop in value of the account to \$105,738.27, as of June 13, 2000, when the decree was entered, was not due to the withdrawals, because they were made *after the* decree was entered.

these monies as he saw fit without the approval or knowledge of the Petitioner.

Further, Petitioner's counsel submitted copies of the plan documents which show that they will not calculate the sums owed to the Petitioner. The company requires that the Order state a specific amount of money to be transferred to the Petitioner. This Court was not provided with the figures necessary to attempt a calculation and does not believe that it is required to act as an accountant for the parties. Therefore, given the facts of this case and the evidence before the Court, the Petitioner's tendered Qualified Domestic Relations Order is just and appropriate under the circumstances.

This is a final and appealable Order, there being no just reason for delay.

On September 19, 2001, the court entered a "Qualified Domestic Relations Order - SIP" awarding Sandy "\$52,869.14<sup>3</sup> from the Participant's account in the DuPont Savings and Investment Plan (SIP) to be prorated between the before-tax and regular assets."

On September 26, 2001, Paul moved to amend, alter and vacate the September 19, 2001 orders. By order entered October 4, 2001, the court denied the motion, stating that:

The Court has found in its prior Order that the Respondent had complete control over this account. If he was unhappy with the progress of the Petitioner in obtaining her share of the

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<sup>3</sup> Paul notes that the court delayed ruling upon Sandy's motion to enter the QDRO for 45 days, until a week after the World Trade Center disaster. Paul asserts that this was prejudicial to him, because it effectively gave Sandy 75% of the value of the SIP, rather than the 50% agreed upon by the parties, due to decreased stock values following September 11, 2001.

proceeds, he could have directed his counsel to prepare a Qualified Domestic Relations Order that would separate these monies. Instead, he withdrew money from this account when needed and waited until Petitioner's counsel submitted a Qualified Domestic Relations Order at which time he objected to the method of the division and complained about her delay in submitting the documents.

This is a final and appealable Order, there being no just reason for delay.

On October 8, 2001, Paul timely filed a notice of appeal to this Court. On appeal, Paul argues that:

- I. THE TRIAL COURT'S MODIFICATION AND REWRITE OF THE PARTIES AGREEMENT WAS ERROR
- II. THE TRIAL COURT MISAPPLIED CONSTRUCTION RULES TO THE PARTIES' AGREEMENT RELATIVE TO SIP RETIREMENT
- III. THE TRIAL COURT ABUSED DISCRETION (IF IT HAD ANY)
- IV. WHICH PARTY HAS THE RESPONSIBILITY TO PREPARE AND EFFECT ENTRY OF QDRO
- V. IT IS GROSSLY INEQUITABLE AND AN ABUSE OF DISCRETION TO STICK PAUL WITH THE ENTIRE STOCK LOSS RESULTING FROM WORLD TRADE CENTER DISASTER

I.

Paul asserts that the trial court erred in changing the Agreement so that Sandy's half of the SIP was not adjusted for her pro-rata share of earnings or losses experienced in between the time of entry of the decree and the QDRO.

We agree. As noted by Paul, KRS 403.180(6) provides that "Except for terms concerning the support, custody or visitation of the children, the Decree may expressly preclude or limit modification of terms if the Separation Agreement so

provides." Here, the parties' Agreement expressly precluded modification. In *Brown v. Brown*,<sup>4</sup> the Supreme Court stated that "by expressly doing so the parties may settle their affairs with a finality beyond the Court's continuing equitable jurisdiction elsewhere provided." Thus, the trial court erred in modifying the parties' Agreement by declaring that Paul should bear any drop in value of the account due to the stock market.

The parties' Agreement expressly and unambiguously provided for the SIP retirement to be divided equally as of the date of the final decree, with Sandy's interest to be adjusted, pro-rata, for any gains or losses occurring after entry of the decree until transfer. Undoubtedly, the parties understood that the dollar value of the SIP could change. The Agreement plainly states that the value of the plan was "subject to fluctuation based upon the value of stock in the plan."

At the time the Decree was entered, Paul owned 2256.6122 shares of stock in the SIP. Half of that equals 1128.3061 shares. In accordance with the Agreement, "Sandy's interest shall be transferred to her by way of a Qualified Domestic Relations Order, plus her pro-rata share of any earnings or minus her pro-rata share of any losses which may be experienced after the date of the entry of said decree . . . until said funds are actually transferred into a separate

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<sup>4</sup> Ky., 796 S.W.2d 5, 7 (1990).

account for Sandy." As Paul explains, the dollar value of Sandy's interest in the SIP can be readily determined from the number of her shares and the dollar value per share on any given date. Paul's liquidation of some of *his* shares, after the date the decree was entered dividing the SIP, has no bearing on Sandy's interest.

We reverse and remand with direction that the trial court enter a QDRO in accordance with the parties' Agreement. Pursuant to Paul's request, in the event Dupont has already transferred and assigned Sandy her share of the SIP, the trial court shall enter a Judgment in Paul's favor awarding him any excess sum transferred to Sandy.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Michael T. Connelly  
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

Terry W. Holloway  
Louisville, Kentucky