

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000643-MR
AND
NO. 2006-CA-000976-MR

LERA BRAEHLER, INDIVIDUALLY;
LERA BRAEHLER, ON BEHALF OF THE
ESTATE OF RONALD J. BRAEHLER

APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL
FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 93-FD-003535

PAULA FLEMING
(FORMERLY PAULA BRAEHLER)

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: This is an appeal from a motion filed in a divorce case in which the final decree was entered in 1994. The issue at bar involves the allocation of survivor pension benefits as between the former wife, Ms. Fleming, and the surviving wife, Ms. Braehler. In March, 2006, the Jefferson Family Court determined that the Qualified

Domestic Relations Order (QDRO), making Ms. Fleming the recipient of her ex-husband's, Mr. Braehler, surviving spouse pension benefits, could not be amended to clarify whether or not Ms. Fleming was entitled to all those benefits or only a portion thereof. Ms. Braehler appeals, both as an individual and on behalf of her husband's estate, arguing that she was entitled to the majority of the survivor pension benefits and that the QDRO was mistakenly interpreted permitting Ms. Fleming to draw the entire amount. Ms. Fleming cross-appeals, arguing that Ms. Braehler does not have standing to seek amendment of the QDRO, either as an individual or on behalf of the estate. We find Ms. Fleming's argument persuasive and hold that Ms. Braehler does not have standing to bring this cause of action.

Ronald Braehler and Paula Braehler, now Fleming, were divorced pursuant to a final decree of dissolution of marriage entered by the Jefferson Family Court on May 3, 1994. The decree incorporated the terms of a property settlement agreement (PSA). According to the PSA, a QDRO was to be executed giving Ms. Fleming "one-half of the [pension] benefits accrued therein from the date of marriage to the date of entry of a final decree; distributed at such time as the Respondent (Mr. Braehler) is eligible to receive same." The order was drafted by Ms. Fleming's counsel and signed by Mr. Braehler's counsel, as agreed to.

The QDRO was entered on November 21, 1994, and incorporated the terms of the PSA. The language concerning the pension benefits was as follows:

1. The Plan shall pay in accordance with the following to the alternate payee shown below a portion of the retirement benefits otherwise payable to the participant shown below:
 - a. The amount payable to the alternate payee with respect to participant's pension benefits shall be 50% of the amount otherwise payable to such Participant as of May 4, 1994 pursuant to such plan. Said payment shall commence upon participant's earliest retirement eligibility.
 - b. The alternate payee shall be treated as a surviving spouse under the plan and, accordingly, in the event of death of the participant either before or after commencement of retirement benefits, payment shall be made to the alternate payee as provided in the Plan for a surviving spouse.

Mr. Braehler remarried in 1997. Mr. Braehler retired effective June 1, 2003, and began receiving pension benefits. Ms. Fleming began receiving her portion of these benefits at this time. When Mr. Braehler died on November 6, 2004, the pension plan then began paying Ms. Fleming all of the surviving spouse benefits as set forth in the QDRO. Ms. Braehler received no pension benefits.

On May 25, 2005, Ms. Braehler filed a motion seeking to amend the QDRO to direct that she be paid the balance of the survivor's benefits over and above the amount that she believed Ms. Fleming would be entitled to under the PSA, to wit: fifty percent of the survivor's benefits payable as of May 4, 1994. Failing an amendment of the QDRO, Ms. Braehler contends that she is seeking enforcement of the PSA which restricted Ms. Fleming's benefit to a percentage of the pension. Ms. Fleming filed a motion to dismiss stating that the QDRO could not be amended because only Mr. Braehler could seek such an amendment and, thus, Ms. Braehler had no standing. Hearings were held on the motions and on December 21, 2005, the Jefferson Family Court entered an order denying

the motion to file an amended QDRO and granting the motion to dismiss. This appeal followed.

Ms. Braehler is asking this Court to either direct the lower court to amend the QDRO or to order Ms. Fleming personally pay her the portion of the benefits she receives in excess of the original allocation set forth in the settlement agreement.

Ms. Braehler argues that, either acting herself as surviving spouse or as executrix of her husband's estate, she is entitled to the lion's share of Mr. Braehler's survivor pension benefits. Ms. Fleming cross-appeals contending that Ms. Braehler does not have standing to bring this action either on her own behalf or as executrix. We agree with Ms. Fleming that there is no viable cause of action here. Ms. Braehler has no standing to seek relief personally or on behalf of Mr. Braehler's estate on either the QDRO or PSA.

"It is the law of this jurisdiction that no stranger to a contract may sue for its breach unless the contract was made for his benefit." *Sexton v. Taylor County*, 692 S.W.2d 808 (Ky.App. 1985). Ms. Braehler has no standing to bring a cause of action challenging the terms of the PSA or QDRO on her own behalf because she was not a party to either the agreement or the order, nor was either executed for her benefit.

Her claim on behalf of the estate likewise fails. Survivorship benefits come into existence only upon the death of the principal recipient. In this case, there is a named beneficiary of the survivor's benefits. The QDRO names Ms. Fleming as the "alternate payee" who is also a "surviving spouse". There is no evidence in this record

that would support a finding that had there been no surviving spouse named, the estate would have a claim. Ms. Fleming is entitled to the surviving spouse pension benefits under the terms of the order and when Mr. Braehler died, the surviving spouse benefits vested in Ms. Fleming and passed to her outside of the estate. When an employee dies without naming an alternate payee of the survivor's rights, the rights to dispose of the benefits lapses. *Samaroo v. Samaroo, et al*, 193 F.3d 185, 191 (3rd Cir., 1999).

Furthermore, Ms. Braehler's initial motion to amend the QDRO invoked the court's jurisdiction via civil rule 60.02. This rule requires that the motion be made within a reasonable time. Because her motion was not brought until over 10 years after the QDRO was filed, we believe the reasonable time requirement was not met. The QDRO was signed by Mr. Braehler's attorney in 1994, at which time he presumably knew that it contained a provision in regard to the survivor's benefits. At that point, action could have been taken to reconcile the QDRO to the PSA if he believed they were inconsistent. Additionally, upon Mr. Braehler's remarriage, he could have sought to amend the QDRO to remove Ms. Fleming as the alternate payee to permit his new wife to receive the surviving spouse pension benefits upon his retirement. Mr. Braehler did neither of these things. Additionally, the record contains correspondence dated December 12, 1994, that was sent by Ford Motor Company, the late Mr. Braehler's employer, to both Mr. Braehler and Ms. Fleming acknowledging receipt of the QDRO and finding that it was acceptable. That letter set forth Ford's understanding of the terms of the order and explicitly set out that "the alternate payee is to be treated as a surviving spouse under the plan." Ms.

Braehler's contention that she did not understand the terms of the QDRO is meaningless in this context as it is Mr. Braehler who had the interest in the pension contract and PSA. Mr. Braehler had at least two opportunities to correct the QDRO if it did not reflect the terms of the PSA.

For the above reasons, the judgment is affirmed.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion because I believe its reasoning is flawed both as to Ms. Braehler's standing to seek clarification of the qualified domestic relations order (QDRO) and as to the timeliness of her motion.

The clear intent of Ronald and Ms. Fleming when they entered into the property settlement agreement (PSA), was that Ms. Fleming was to receive only her marital share of the pension benefits or, as set forth in the QDRO, fifty percent of the amount payable to Ronald as of May 4, 1994. Until Ronald's death in 2004, Ms. Fleming received her proper distribution of \$194 per month. Yet, because of a mistake in the QDRO, Ms. Fleming will receive \$891.87 per month leaving Ronald's surviving spouse with nothing from his pension.

The interpretation of the plan administrator of this QDRO has been collaterally attacked in the United States District Court for the Western District of Kentucky, Louisville Division, Case Number 3:06-cv-306-R, *Lera K. Braehler v. Ford*

Motor Company UAW Retirement Plan and we have the benefit of that court's memorandum opinion affirming the plan administrator's interpretation of this QDRO. Judge Russell's opinion states that Mr. Braehler specifically designated appellant as his surviving spouse when he applied for early retirement on June 1, 2003.

I cannot defy common sense and agree that justice has been served by holding that Ms. Braehler, as Ronald's surviving spouse and executrix of his estate, has no standing to modify the QDRO to comply with the clear terms of the PSA. If, as the majority holds, she has no right to challenge the distribution of the pension benefits, the question remains: Who does have the right to challenge what is an obvious mistake in the QDRO and one that is in direct contradiction to the terms of the PSA?

The majority erroneously concludes that as the personal representative of the estate, Ms. Braehler lacks standing because the surviving spouse benefits vested in Ms. Fleming and passed outside the estate. This case is an action to enforce the terms of the PSA and to modify the QDRO to conform to those terms. Actions based on marital settlement agreements survive the death of a party to the contract and may be brought by the personal representative of a decedent to enforce the terms of the agreement. *See In re Bryant*, 260 B.R. 839 (Bkrctcy. W.D. Ky. 2001). Moreover, there are many occasions on which the executor/executrix of an estate performs nominal acts, such as the execution of deeds, which do not pass through the estate and which have no direct benefit to the estate. *Wood v. Wingfield*, 816 S.W.2d 899 (Ky. 1991).

I must also disagree as to the timeliness of Ms. Braehler's motion. While ten years elapsed from the date the QDRO was filed until Ms. Braehler filed her motion, it was brought within a reasonable time after it was discovered that the plan administrator interpreted the QDRO to entitle Ms. Fleming to one hundred percent of the survivor benefits. The reasonable time requirement of CR 60.02 must be determined from the time when the mistake was or should have been known. *See Cain v. Cain*, 777 S.W.2d 238 (Ky.App. 1989).

Although the correspondence from Ford Motor Company to Mr. Braehler indicated that Ms. Fleming was to be treated as a surviving spouse, it did not state that she was the sole surviving spouse under the plan. Therefore, I do not believe that prior to his death, Mr. Braehler had sufficient knowledge of the plan administrator's interpretation of the QDRO.

Mr. Braehler did not die until November 6, 2004, and on December 28, 2005, Ms. Braehler filed a claim requesting surviving spouse benefits with Ford Motor Company. For these reasons, I believe that promptly upon discovery of the mistake in this QDRO, the appellant proceeded to the Jefferson Circuit Court, Family Court Division One, requesting relief from a clear mistake. In my opinion, her prompt request for relief from this mistake after its discovery should have been granted by the trial court.

It is my belief that the QDRO needs to be corrected *nunc pro tunc* by the inclusion of the following language: "Paula Fleming (formerly Paula Braehler) is hereby designated as a surviving spouse for the purpose of distribution of the benefits of her

marital share of the retirement benefits to which she was entitled in the decree of dissolution of marriage. The spouse of Ronald J. Braehler, if any, at the time of his death is hereby designated as the surviving spouse for any other retirement benefits due the surviving spouse of Ronald J. Braehler at the time of his death.”

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