

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

JY,		:	NO. 09-20,426
	Plaintiff	:	
		:	
	vs.	:	
		:	
SY,		:	
	Defendant	:	IN DIVORCE

OPINION & ORDER

AND NOW, this 1st Day of **February, 2012**, this order is entered after a hearing regarding Wife’s Petition for Enforcement of Agreement and Petition for Payment of Counsel Fees filed January 11, 2012. At the hearing held on January 31, 2012, JY (Husband) was present and represented by W. Jeffery Yates, Esquire; SY (Wife) was not present; however her attorney Janice R. Yaw, Esquire was present.

Background

On March 24, 2011 the parties entered into a Separation and Property Settlement Agreement (Agreement); at that time, both parties were represented by counsel. The Agreement indicated “Wife shall receive 60% of the marital portion of Husband’s gross retirement account. Wife shall receive a survivorship benefit and death benefit for her portion only. Wife’s attorney shall prepare the Qualified Domestic Relations Order and Husband shall execute the same and return to Wife Promptly.” Counsel for Wife drafted the Qualified Domestic Relations Order (QDRO) and forwarded it to the Commonwealth of Pennsylvania State Employees’ Retirement System Legal Office (SERS) for approval. SERS directed counsel for Wife to make changes to the QDRO; at that time counsel for

Husband contacted Wife's counsel regarding language to be changed in the QDRO. Husband requested that the date of separation be used in the equation for division of the Husband's retirement benefits. Counsel for Wife argues that Husband's request is contrary to Pennsylvania law and indicated that she would not make the changes Husband requested. Husband has refused to execute the QDRO and has indicated that he will not do so until the language is changed. At issue whether Husband should be compelled to sign the amended QDRO and be bound by the terms of the QDRO entered into on March 24, 2011 or if the language of the QDRO was intended to reference the date of separation.

Wife's Petition for Enforcement of the Agreement/Petition for Payment of Counsel Fees

Wife requests that the Court compel Husband to sign the amended QDRO that contains SERS standard language regarding the coverture fraction. Wife argues that the language that Husband would like in the QDRO, "retirement Code in effect on the effective date of Member's retirement and Member's final average salary as to the date of separation," is not what the parties agreed to and is contrary to current Pennsylvania law. Wife further argues that Husband's counsel was advised that his proposed changes were contrary to Pennsylvania law and that counsel was provided a copy of the statute. Wife is seeking attorney's fees due to the fact that Husband has not signed the QDRO as he contracted to do on March 24, 2011 when he signed the Agreement and further the Agreement has a provision, paragraph 18. Default, that states " Husband and Wife agree that if either party fails in the due performance of any of their obligation hereunder, the injured party shall have the right at their election to sue for damages for breach hereof, or

to rescind the agreement or such other legal remedies as may be available to them, including attorney's fees. . . ." Wife argues that Husband refusing to execute the QDRO has resulted in her accruing additional attorney's fees and she should be compensated for her damages.

Husband argues that he agreed to the date of separation being used in the calculation of benefits not to the effective date of his retirement. He acknowledges that the standard language of SERS is

"the marital property component of Member's retirement benefit equals: (1) the Coverture Fraction multiplied by (2) the Member's retirement benefit on the effective date of Member's retirement calculated using the Retirement Code in effect on the effective date of Member's retirement and Member's final average salary as of the effective date of retirement."

However, Husband argues that a representative from SERS informed him that *date of separation* language could be used as long as the parties agree. Husband requests the Court to compel Wife to make the language changes to the QDRO and Husband is seeking attorney's fees based on the fact of his preparation for "this needless *Response*."

Analysis

Property Settlement Agreements, such as the one in this case, are governed by contract law. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) (citing *Vaccarello v. Vaccarello*, 757 A.2d 909, 914 (Pa. 2000); *see also Krizovensky v. Krizovensky*, 624 A.2d 638, 642 (Pa. Super. 1993). When interpreting an Agreement under contract law the Court must look to the intent of the parties. *Kripp* at 1163. If the terms of the contract are clear and unambiguous the Court must ascertain the intent of the parties from the Agreement itself. *Id.* There is no claim of ambiguity by either party.

Paragraph ten (10) of the Agreement states: “Wife shall receive 60% of the marital portion of Husband’s gross retirement account. Wife shall receive a survivorship benefit and death benefit for her portion only. Wife’s attorney shall prepare the Qualified Domestic Relations Order and Husband shall execute the same and return to Wife Promptly.” Other than stating the percentage Wife will receive the Agreement is silent on the division of the retirement benefits. When an agreement is silent on terms applicable statutes will fill in the blanks. In this case the legislature enacted 23 Pa. C.S. § 3501 (c) which states:

c) *Defined benefit retirement plans.* --Notwithstanding subsections (a), (a.1) and (b):

(1) In the case of the marital portion of a defined benefit retirement plan being distributed by means of a deferred distribution, the defined benefit plan shall be allocated between its marital and non-marital portions solely by use of a coverture fraction. The denominator of the coverture fraction shall be the number of months the employee spouse worked to earn the total benefit and the numerator shall be the number of such months during which the parties were married and not finally separated. The benefit to which the coverture fraction is applied shall include all post-separation enhancements except for enhancements arising from post-separation monetary contributions made by the employee spouse, including the gain or loss on such contributions.

The statute mandates that denominator shall be the total length of service and the numerator shall be the number of months married. In the absence of an agreement otherwise the statute terms will prevail. The Court finds that Pennsylvania Law delineates the calculation for division of defined benefit retirement plans and it is contrary to what Husband is requesting. Husband failed to show that an agreement other than the statutory law was reached regarding the division of benefits.

Therefore, Wife's Petition for Enforcement of the Agreement is hereby **GRANTED**. Husband is order and directed to execute the QDRO prepared by Wife's Counsel within five (5) days of the entry of this order.

In regard to counsel fees, the Court agrees with Wife's attorney that litigation in this matter was "*needless*." After counsel for Husband was provided with the current Pennsylvania Law¹ Husband still refused to execute the QDRO and attempted to negotiate terms that were not included in the comprehensive Agreement entered into by the parties and that is contrary to the statute. Therefore, Wife is awarded attorney's fees in the amount of \$400.00. Husband shall make the payment to Wife's counsel within thirty (30) days of the date of this Order. Husband's request for attorney's fees is **DENIED**.

BY THE COURT,

Joy Reynolds McCoy, Judge

¹ During the hearing counsel for Wife mentioned that 23 Pa. C.S. 3501 had been updated and suggested that counsel for Husband was relying on old law. The current statute has been in effect since January 28, 2005.