

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

VICKI SUE SCHINDLER,

Petitioner,

vs.

JOHN WILLIAM SCHINDLER,

Respondent.

Case No. CI01-53

**ORDER MODIFYING DECREE
WITHIN TERM**

DATE OF HEARING: November 5, 2001.

DATE OF RENDITION: January 4, 2002.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:
For petitioner: No personal appearance; Mark D. Fitzgerald on brief.
For respondent: James D. Gotschall without respondent.

SUBJECT OF ORDER: Joint motion for nunc pro tunc.

PROCEEDINGS: See journal entry entered on November 5, 2001.

FINDINGS: The court finds and concludes that:

1. Decree of dissolution was entered in this case on August 22, 2001. The decree attached and incorporated by reference as Appendix "E" a qualified domestic relations order (QDRO) form regarding the division of the petitioner's State of Nebraska Employee's Retirement Plan. The motion implies that the plan administrator found some language in the QDRO unacceptable and requested alternate language.

2. Because the court doubted that this was a proper use of an order nunc pro tunc, the matter was assigned for hearing. At the hearing, respondent's counsel offered a well-crafted but ultimately unpersuasive argument regarding the propriety of an order nunc pro tunc in the present instance. At the close of the hearing, respondent's counsel represented that both he and counsel for petitioner desired the court to construe the motion as one for modification within term if not properly considered as nunc pro tunc.

3. The Nebraska Supreme Court has often stated that it is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render

an order different from the one actually rendered, even though such order was not the order intended. *Fay v. Dowding, Dowding & Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). The sole and only scope and purpose of a nunc pro tunc order or decree is to make the record speak the truth, not to change or amend it. *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976). Clerical errors may be corrected by order nunc pro tunc, but judicial errors may not. *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). Stated another way, the order nunc pro tunc cannot be used to enlarge a judgment from that originally rendered or to change rights fixed by the order as originally made. *Application of Andrews*, 178 Neb. 799, 135 N.W.2d 712 (1965).

4. In this instance, the motion seeks to substitute a different QDRO from that attached to the decree and incorporated by reference. Comparison of the proposed QDRO to that actually attached to the decree and incorporated by reference reveals that the rights provided in the two documents are different in significant respects. The second unnumbered paragraph of the proposed QDRO (its first “order” paragraph) provides for a fixed allocation of a specific amount as of a certain specified date. The initial QDRO provides for a benefit in the first sentence of paragraph 2.a. that is probably equivalent to the substitute QDRO. But the balance of paragraph 2.a. provided specific rights different from those represented in the proposed substitute. This court concludes that the substitution of the proposed QDRO would change rights fixed by the decree as initially entered. Consequently, a nunc pro tunc decree is not appropriate. Moreover, there is nothing in the record to indicate that the decree that was entered on August 22, 2001, was not exactly what the parties requested the court to render and what the court intended to and actually did render on that date. The decree speaks the truth as the parties and the court intended to speak at the time. Of course, the problem is that the parties now desire it to speak something different.

5. Thus, the court considers the parties’ alternative request for modification. The district court has the inherent authority to vacate or modify its decision within the same term that the initial decision was rendered. *Talkington v. Women’s Servs., P.C.*, 256 Neb. 2, 588 N.W.2d 790 (1999). Such power exists independently of any statute. *Zerr v. Zerr*, 7 Neb. App. 885, 586 N.W.2d 465 (1998). By local rule, the term during which the initial decree was rendered and entered began on January 1, 2001, and ended on December 31, 2001. Rule 8-2. Consequently, the motion now under consideration was filed,

hearing held thereon, and the matter taken under advisement, during the same term as the initial decree. If the court has entertained a motion to modify and retains the authority to rule on such a motion within term, the court has continuing authority to enter an order modifying the prior order even though the term has subsequently expired. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). Clearly, the court still retains authority to modify within term as to the matter raised by the motion.

6. In addition, the Legislature recently provided an alternative ground of authority to act. NEB. REV. STAT. § 25-2001(1) (Cum. Supp. 2000) states that “[t]he inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order.” The present motion was filed within six months after the initial decree. Section 25-2001(1) provides additional authority to modify.

7. In a submission after the court assigned the matter for hearing, which the court construes as a brief, the petitioner’s counsel gently remonstrated regarding this court’s preference to include a QDRO as an appendix attached to and incorporated in the decree. The recent case of *Koziol v. Koziol*, 10 Neb. App. 675, ___ N.W.2d ___ (2001), illustrates the ample reason for this court’s approach.

8. A fundamental key to understanding the nature of a QDRO is that, at its heart, it is *not* a creation of federal law. A “qualified domestic relations order” is merely a “domestic relations order” meeting certain qualifications. 29 U.S.C. § 1056(d)(3)(B)(i). A “domestic relations order,” as used in that term, is “any judgment, decree, or order . . . which . . . relates to . . . marital property rights . . . *made pursuant to a State domestic relations law . . .*” 29 U.S.C. § 1056(d)(3)(B)(ii) (emphasis supplied). Thus, before a judgment or decree can be classified as a “qualified domestic relations order,” it must first qualify as a “domestic relations order” as determined by state law. It then follows that, in regard to a Nebraska dissolution proceeding, underlying other requirements regarding “qualif[ication]” is the basic requirement that the judgment or decree comply with the Nebraska dissolution law.

9. Under Nebraska law, dissolution of marriage must be accomplished by court decree. NEB. REV. STAT. § 42-347(2) (Cum. Supp. 2000). Division of marital property is a proper function of a dissolution decree. NEB. REV. STAT. § 42-365 (Reissue 1998). The marital estate includes, for purposes of division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other

deferred compensation benefits owned by either party, whether vested or not vested. NEB. REV. STAT. § 42-366(8) (Reissue 1998). The statutes contemplate the entry of a final decree of dissolution. NEB. REV. STAT. §§ 42-372 and 42-372.01 (Cum. Supp. 2000).

10. The *Koziol* case amply illustrates the mischief which may follow where it is unclear whether a decree fully disposes of all issues. In that case, a decree was entered on August 6, 1999, purporting to determine all issues, but contemplating a later supplement to the decree in lieu of a QDRO. On April 4, 2000, the wife filed a motion for entry of a supplement. On May 24, 2000, the district court filed a supplemental order, from which the husband appealed. The Court of Appeals determined that the August 6, 1999, decree was not a final decree from which an appeal could have been taken, even though both parties considered it as such, because of the reservation of the issue of pension division, and the August 6, 1999, decree remained interlocutory until the May 24, 2000, supplemental order. The potential ramifications are enormous. Either or both parties may have remarried, and because the trial court decree was not final, the various waiting periods did not begin to run until the May 24, 2000, order completed the determination of all issues and converted the former interlocutory order into a final decree.

11. Once a decree becomes final, its meaning is determined as a matter of law from the four corners of the decree. *Koziol v. Koziol, supra*. After term, the authority to modify would be extremely limited. The *Koziol* court noted the problem arising between the interplay of the rules regarding QDROs and those governing finality of decrees:

Other courts with rules similar to Nebraska's on the finality of decrees and the inability of courts to change a decree once it has become final have encountered the problem of how to make a final order in a dissolution case and at the same time reserve to the court the power to enter a QDRO, or an order in lieu of such. . . .

Some decrees dividing a pension are so fashioned that they dispose of all of the issues raised and therefore are final orders notwithstanding some provision for the QDRO or an order in lieu thereof. It may be that other decrees are not fashioned to dispose of all issues and therefore are not final. As the *Goldenstein* court held, the issue is to be determined by the nature of the order itself as disclosed by its terms.

Koziol v. Koziol, supra at 686-87, ___ N.W.2d at ___ (citing *Goldenstein v. Goldenstein*, 110 Neb. 788, 195 N.W. 110 (1923)).

12. The potential for mischief and for severe and unanticipated consequences arising from an apparently final decree that turns out to be interlocutory far outweighs the time and expense imposed on the parties and their counsel to assure that a truly final decree is entered to begin with.

13. This court is persuaded that the best approach is to use the highest degree of care to craft final decrees to fully determine the division of the parties' pension rights in the decree itself, whether or not a QDRO is attached. Such decrees must be structured such that the determinations of those rights is completely and definitely described, and no language used contemplating later determination of those rights. If that standard is met, the specification in the decree of a subsequent QDRO will not cause the decree to be considered interlocutory. Under those circumstances, the QDRO constitutes merely an enforcement device. *Koziol v. Koziol, supra*. Of course, that is a difficult standard to meet for even the most highly skilled legal practitioners. The practical reality is that, in many cases, failing to attach and incorporate the QDRO in the decree will lead to a sleeping interlocutory decree that lies waiting to come to finality months and perhaps even years later. This truly extends an invitation to rather horrific consequences to the particular parties in that nightmare experience.

14. This court acknowledges that this situation places on counsel a duty to obtain prompt responses from plan administrators. That duty imposes additional costs on the parties, usually at a time when they least can afford the extra expense. But including the QDRO in the final decree provides the longest possible time for those problems to be resolved before the straitjacket of ultimate finality attaches.

15. The informal brief also raised the concern about the invasion of the parties' privacy arising from stating the terms of their agreement in the decree. However, the issue of privacy is controlled by the dissolution statutes.

16. Those statutes expressly authorize a court to restrict the availability of *evidence* or of a *bill of exceptions*. NEB. REV. STAT. § 42-356 (Reissue 1998). That statute does not pertain to the parties' pleadings or the court's decree.

17. The dissolution statutes afford the parties an opportunity to retain privacy in exchange for the loss of means of enforcement. Section 42-366(4)(b) contemplates an agreement which provides that its terms shall not be set forth in the decree. NEB. REV. STAT. § 42-366(4)(b) (Reissue 1998). But subsection (5) only authorizes enforcement by the remedies available for enforcement of a judgment if the

terms of the agreement are set forth in the decree. NEB. REV. STAT. § 42-366(5) (Reissue 1998). An agreement which retains privacy but forgoes capability of enforcement as a judgment would probably be unconscionable in the absence of significant, alternate enforcement mechanisms in the agreement. Thus, in most instances, the dissolution statutes effectively mandate inclusion of the agreement terms in the decree.

18. That statutory framework constitutes the pronouncement of the legislature of the public policy of Nebraska. The wisdom, justice, policy, or expediency of a statute is for the legislature alone. *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991). Whatever the parties' or counsels' views of the wisdom of the policies inherent in the dissolution statutes, such issues should be addressed to the legislative branch and not to this court. In most instances, capability of enforcement is a key ingredient to a determination that a settlement agreement is conscionable. The statute requires statement of the agreement terms in the decree to authorize the means of enforcement as a judgment. Thus, most situations will require the terms to be set forth in the decree, including terms regarding division of pension rights. Notwithstanding the parties' or counsels' views, it is the duty of a court to administer the law as it exists. *State v. Tatreau*, 176 Neb. 381, 126 N.W.2d 157 (1964).

19. Finally, the court finds that the joint motion, construed as a motion to modify decree within term, should be granted, and the Qualified Domestic Relations Order attached hereto as Appendix "E" and incorporated by reference should be substituted for and replace the original Appendix "E" as if the attachment to this order had been originally attached to the decree.

ORDER: IT IS THEREFORE ORDERED that:

1. To the extent the parties request the court to consider the motion as a motion nunc pro tunc, the motion is denied.

2. As the parties alternatively request, the court considers the motion as a motion to modify within term, and as such is granted.

3. Appendix "E" attached hereto, entitled "Qualified Domestic Relations Order," is substituted for and shall replace the Appendix "E" attached to the original decree. The original Appendix "E" attached to the decree entered on August 22, 2001, shall be of no force or effect. The Appendix "E" attached hereto shall be fully effective.

4. This order modifying decree shall operate retroactively, and be considered as effective as of the date of the original decree of August 22, 2001.

5. In all other respects, the decree remains fully effective as originally entered.

Signed in chambers at **Ainsworth**, Nebraska, on **January 4, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
 - Note the decision on the trial docket as: [date of filing] **Signed "Order Modifying Decree Within Term" entered**.
Done on _____, 20____ by _____.
 - Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- 9** Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: