

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ALBERT G. BURNELIS, JR.

Appellant

v.

MARY BURNELIS

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1026 WDA 2012

Appeal from the Order Entered May 31, 2012
In the Court of Common Pleas of Allegheny County
Family Court at No(s): FD 09-01798-001

BEFORE: SHOGAN, J., LAZARUS, J., and MUSMANNO, J.

MEMORANDUM BY LAZARUS, J.

FILED: October 29, 2013

Albert G. Burnelis, Jr. (Husband) appeals from the qualified domestic relations order (QDRO) entered in the Court of Common Pleas of Allegheny County granting rights to Mary Burnelis (Wife) in Husband's Prudential Annuity.¹ After careful review, we affirm based on the opinion of the Honorable Michael F. Marmo.

The parties were married on November 7, 1995, and were divorced on July 12, 2011. By order dated April 25, 2011, the trial court determined that Wife was entitled to, *inter alia*, \$12,150.00 from Husband's annuity. On

¹ By letter dated April 4, 2013, counsel for Wife informed this Court that Wife died on February 20, 2013. Because the parties' briefs had been filed, the appeal may proceed. **See** Pa.R.A.P. 502. Pursuant to section 3323(d) of the Divorce Code, 23 Pa.C.S. § 3323(d), if a party dies after the entry of a divorce decree, an action as to property rights shall proceed.

June 8, 2011, the trial court modified the April 25, 2011 order to provide that Wife was to receive \$6,377.14 from Husband's annuity. On May 29, 2012, the court approved and entered a QDRO prepared by counsel for Wife with respect to the annuity.

The QDRO specifically referenced the June 8, 2011 order, which provided that Wife was to receive \$6,377.14 from Husband's annuity.

Husband sought reconsideration, based on his objection to the following provision of the QDRO, which he believed granted Wife 100% of Husband's monthly benefit, rather than the 4.9% set forth in the June 8, 2011 order:

Part D – Payment Information

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(2) Form and Time of Payment – Once this order is determined by the Plan Administrator to be a qualified [QDRO], distribution to the Alternate Payee shall be made in monthly payments currently being made to Participant in the amount of \$696.38 and/or an amount equal to 100% of the Participant's total monthly benefit payable during the Participant's lifetime.

QDRO, 5/29/12, at 2.

Although the trial court denied Husband's motion for reconsideration on June 12, 2012, it issued the following order the same day:

AND NOW, this 12th day of June, 2012, it is hereby ORDERED, ADJUDGED and DECREED that upon payment of the sum of \$6377.14 to Alternative [sic] Payee, Mary Burnelis, from the Allegheny League of Municipalities Deferred Compensation Plan (Prudential), the May 29, 2012 QDRO will be vacated. Both parties will execute any further document to effectuate the same if needed. If further documents are required by Prudential to

vacate the QDRO, counsel for Alternative [sic] Payee will prepare the same.

Order, 6/12/12, at 1.

Husband filed a timely appeal in which he raises the following issues for our review:

1. Whether the trial court erred by entering a [QDRO] transferring a deferred benefit including premarital components not subject to equitable distribution?
2. Whether the trial court erred by entering a [QDRO] that is inconsistent and contrary [to] its equitable distribution award?

Appellant's Brief, at 6.

"We review the propriety of an equitable distribution order under an abuse of discretion standard." **Lazar v. Lazar**, 804 A.2d 1234, 1236 (Pa. Super. 2002) (citation omitted). Where a QDRO approved by the court is inconsistent with the order directing a party to submit a QDRO, a remand is proper. **Id.** at 1237.

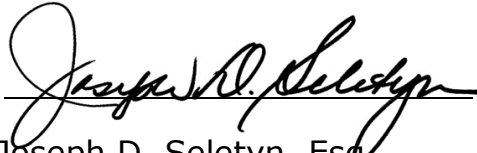
We agree with the trial court that because the QDRO incorporated the June 8, 2011 order, which clearly states that Wife was to receive a total amount of the \$6,377.14 from the annuity, the QDRO is not inconsistent with the June 8, 2011 order. It is also clear that the possibility of any contrary interpretation was nullified by the explicit language of the June 12, 2012 order.

Therefore, we rely upon Judge Marmo's decision to affirm the QDRO. We instruct the parties to attach that decision in the event of further proceedings in this matter.

Order affirmed.²

SHOGAN, J., concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/29/2013

² We recognize that the QDRO contains the following provision:

Part E – Death of Alternate Payee [i.e., Wife]

Except as provided in this Part E, payments required under this order shall be made only to the Alternate Payee. If the Alternate Payee dies after this order is deemed a QDRO by the Plan Administrator but before the actual distribution is made to the Alternate Payee, then distribution of the benefit awarded to the Alternate Payee hereunder shall be made to the Participant.

However, this provision has no bearing on the issues raised by Husband regarding trial court error.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

Albert G. Burnelis, Jr.,

Plaintiff,

v.

Mary Burnelis,

Defendant,

No.: FD-09-001798-001

Superior Court No. 1026 WDA 2012

OPINION

Judge Michael F. Marmo

October 15, 2012

Plaintiff Albert Burnelis (“Husband”) was married to Defendant Mary Burnelis (“Wife”) on November 7 1995 in Oakland, Maryland. They separated on November 20, 2009 and Husband filed for divorce on December 10, 2009.

An evidentiary hearing was held on March 28, 2011, at which time this Court received evidence and testimony in support of the parties' respective claims for divorce and equitable distribution of marital property and Wife's claim for alimony. On April 25, 2011, this Court entered an Order (i) granting the divorce, (ii) providing for an equitable distribution of the parties' marital assets, and (iii) awarding Wife alimony.

A Motion for Reconsideration was presented to the Court on May 16, 2011, and then again on June 1, 2011, which resulted in this Court entering an Order dated June 8, 2011 granting, in part, Husband's Motion for Reconsideration and slightly modifying the equitable

distribution award. One of the assets subject to equitable distribution was Husband's Prudential Financial Retirement Annuity, the marital portion of which was valued at \$43,876.00 and divided \$37,498.86 to Husband and \$6,377.14 was awarded to Wife. Husband filed an appeal of this Court's decision following the equitable distribution proceedings and the Superior Court affirmed.

After the Superior Court affirmed this Court's equitable distribution award, Wife filed a Petition to Approve Qualified Domestic Relations Order ("QDRO") seeking this Court's approval of a proposed QDRO to divide Husband's pension pursuant to the June 8, 2011 Order of Court. The form QDRO had been reviewed and approved by the administrator of the plan, but Husband would not approve the QDRO because he claimed the QDRO awarded Wife 100% of the retirement account (presently valued at over \$128,857). Contrary to Husband's allegations, the proposed QDRO awarded Wife 100% of the monthly payments from the pension only until this Court's June 8, 2011 Order awarding \$6,377.14 to Wife was satisfied. This Court signed the QDRO in the form provided by Wife's attorney following oral argument in motions court on May 29, 2012.

On or about June 12, 2012, Husband presented a Motion for Reconsideration to this Court, which was denied. Although this Court did not grant Husband's Motion for Reconsideration, the Court did enter an Order dated June 12, 2012 to clarify that the QDRO signed by the Court on May 29, 2012 would be vacated upon payment to Wife of the \$6,377.14 she was awarded from the pension in equitable distribution. The QDRO specifically referenced the June 8, 2011 Order of Court and Wife's counsel sent a cover letter to the plan administrator further advising that the QDRO would terminate upon payment to Wife of \$6,377.14.

Husband filed the instant appeal on June 29, 2012 raising the following issues: (i) the trial court erred by approving a QDRO that transferred 100% ownership of a defined benefit pension which included a non-marital component not subject to equitable distribution; (ii) the trial court erred by approving a QDRO that is inconsistent and contrary with the court's equitable distribution award; and (iii) the trial court erred and abused its discretion in transferring 100% of a pension benefit to the spouse who is also the owner of a survivor annuity which would thereby become void.

Husband first argues the trial court erred by approving a QDRO that transferred 100% ownership of defined benefit pension which included a non-marital component not subject to equitable distribution. As explained above, however, this Court did not transfer 100% ownership of the plan from Husband to Wife. Rather, this Court ordered that 100% of Husband's total monthly benefit payment in the amount of \$696.38 be paid to Wife (and not Husband) until such time as the \$6,377.14 awarded to Wife in equitable distribution is paid in full. Not only was the June 8, 2011 Order awarding \$6,377.14 to Wife from the plan specifically referenced in the QDRO, but Wife's counsel indicated in his transmittal letter to the plan administrator:

You will note that the enclosed QDRO provides that Ms. Burnelis is to receive the monthly sum of \$696.38. Also, please note the enclosed separate Order from Judge Marmo dated June 8, 2011 indicating that Ms. Burnelis is to receive the total amount of \$6,377.14 from this account. Therefore, my client should receive monthly benefits of \$696.38 and/or an amount equal to 100% of the participant's total monthly benefit until the total amount of \$6,377.14 is paid.

See Exhibit "B" to Wife's Response to Motion for Reconsideration and Application for Stay or Injunction.

While Husband was not satisfied with the language in the proposed QDRO, Husband's counsel was given adequate opportunity to suggest alternative language. Rather than cooperate

with the efforts of Wife's counsel to prepare a QDRO that was acceptable to both parties and the plan administrator, Husband filed a Motion for Reconsideration with this Court. Husband never submitted an alternative QDRO for the Court to consider and appeared to be content in further delaying Wife's efforts to collect the funds awarded her in equitable distribution.

Although this Court did not grant Husband's Motion for Reconsideration, the Court did enter a second Order dated June 12, 2012 to clarify that the QDRO signed by the Court on May 29, 2012 would be vacated upon payment to Wife of the \$6,377.14 she was awarded from the pension in equitable distribution. This June 12, 2012 Order should have alleviated any legitimate concerns on the part of Husband that Wife would collect more than she was entitled to through the equitable distribution award. Instead, Husband filed an appeal and failed to reference the June 12, 2012 Order of Court.

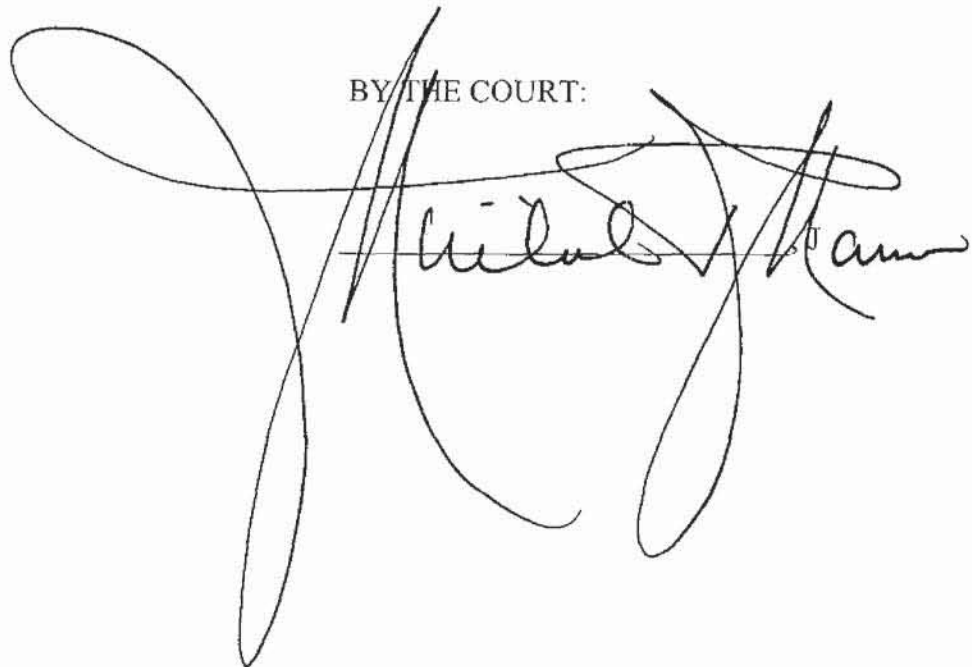
Husband next argues that this Court erred by approving a QDRO that is inconsistent and contrary with the Court's equitable distribution award. For the reasons set forth above, this Court concluded that the QDRO was consistent with the Court's equitable distribution award.

Lastly, Husband argues the trial court erred and abused its discretion in transferring 100% of a pension benefit to Wife who is also the owner of a survivor annuity which would thereby become void. Husband's argument is without merit because the Court did not transfer 100% ownership of the plan to Wife. Rather, this Court ordered that 100% of Husband's total monthly benefit payment in the amount of \$696.38 be paid to Wife (and not Husband) until such time as the \$6,377.14 awarded to Wife in equitable distribution is paid in full. Husband will continue to receive the monthly benefit payments from the plan for the duration of his lifetime after Wife receives the portion awarded to her in equitable distribution. The QDRO was reviewed and

approved by the administrator of the plan and there have been no concerns raised about Wife's survivor annuity becoming void.

For the reasons set forth above, this Court's Order of May 29, 2012 should not be disturbed.

BY THE COURT:

A large, stylized handwritten signature in black ink, appearing to read "Michael J. Han". The signature is written over the text "BY THE COURT:" and is highly cursive and overlapping.