

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

ELIZABETH KUBA,

Appellant,

v.

MARK KUBA,

Respondent.

DOCKET NUMBER WD75041

Date: June 18, 2013

Appeal from:
Clay County Circuit Court
The Honorable Kathryn E. Davis, Judge

Appellate Judges:
Division Two: Alok Ahuja, P.J., Karen King Mitchell and Cynthia L. Martin, JJ.

Attorneys:
Michael C. McIntosh, Independence, MO, for appellant.
Jeffrey S. Royer, Blue Springs, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

ELIZABETH KUBA

Appellant,

v.

MARK KUBA,

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WD75041

Clay County

In 2008, the circuit court entered a decree dissolving the marriage of Elizabeth Kuba (Wife) and Mark Kuba (Husband). At the time of the dissolution, Husband was a member of the Army Reserves and on active duty. He began serving in the military on March 8, 1985, approximately a year before the parties married on April 6, 1986.

The decree awarded Wife “one-half of the marital interest in Husband’s pension and military retirement with the Army which accrued through Husband’s employer during the time of the marriage.” The court subsequently entered a “Military Qualifying Judgment Court Order” (the “Qualifying Order”) to implement the division of Husband’s retirement benefits. The Qualifying Order provided that Wife’s receipt of a share of Husband’s military retired pay would “continue during the joint lives of the parties,” and “shall terminate only upon the death of either Member or Former Spouse.”

Three years later, Wife filed a motion to modify the Qualifying Order, to add a provision requiring Husband to designate her as the beneficiary of survivor benefits associated with his military retirement. Designation as Husband’s survivor would insure that Wife would continue to receive her share of Husband’s retirement pay, even if he predeceased her.

Husband opposed Wife’s motion, arguing that Wife was seeking a substantive modification of the property division in the parties’ dissolution decree, and that the trial court lacked authority to modify the Qualifying Order in this fashion, three years after its entry. The circuit court denied Wife’s motion to modify the Qualifying Order. Wife appeals.

AFFIRMED.

Division Two holds:

First, Husband argues that the Qualifying Order is not a “Qualified Domestic Relations Order” or “QDRO” subject to modification under § 452.330.5, RSMo. Husband argues that,

because the Qualifying Order addresses the division of benefits payable under a “governmental plan,” it is not considered to be a “QDRO” under the Internal Revenue Code, and is therefore not modifiable pursuant to § 452.330.5. To the contrary, 26 U.S.C. § 414(p)(11) provides that payments made under a “governmental plan” are treated as made pursuant to a “QDRO” if the court order assigns to an alternate payee the right to receive a portion of the benefits payable under a governmental retirement plan. The Qualifying Order meets this criterion, and is therefore deemed to be a QDRO under the Internal Revenue Code, and under § 452.330.5, RSMo.

Section 452.330.5, RSMo, provides, in relevant part, that a QDRO “shall be modifiable . . . to revise or conform its terms so as to effectuate the expressed intent of the order.” Wife argues that, in order for her to receive the share of Husband’s military retirement benefits which was awarded to her in the dissolution decree, Husband must be required to designate her as the beneficiary of the Survivor Benefit Plan associated with those retirement benefits, so that she will continue to receive her share of Husband’s retirement pay, even if he predeceases her. In making this argument, Wife relies heavily on our decision in *Wells v. Wells*, 998 S.W.2d 165 (Mo. App. W.D. 1999).

Unlike in *Wells*, however, ordering Husband to designate Wife as his former spouse for purposes of military survivor benefits would constitute a substantive modification of the property division ordered in the dissolution decree, for two reasons: (1) purchasing survivor benefits has a cost, which would be borne equally by Husband and Wife in the form of a reduction to the retirement pay they receive; and (2) designation of Wife as Husband’s survivor would prevent him from providing survivor benefits to his current spouse. A trial court has discretion, at the time of entry of an original dissolution decree, to order that a former spouse be provided survivor benefits in these circumstances; in that event, the trial court may choose to adjust other aspects of the property division ordered in the decree to account for the award of survivor benefits. Because of the substantive issues surrounding the award of military survivor benefits, however, we will not interpret a decree which is silent concerning such benefits as if the decree awarded them.

Before: Division Two: Alok Ahuja, P.J., Karen King Mitchell and Cynthia L. Martin, JJ.

Opinion by: Alok Ahuja, Judge

June 18, 2013

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