Circuit Court for Harford County
Case No. 12-C-18-000369

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 584

September Term, 2024

VIRGIL ANTHONY PROFILI, JR.

v.

DANA MARIE PROFILI

Friedman,
Tang,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: May 27, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The dispute in this appeal concerns the interpretation of a marital settlement agreement involving pension benefits. In 1987, appellant Virgil Profili ("Virgil") began his employment with PepsiCo, Inc. and became a participant in the PepsiCo Employees Retirement Plan A ("pension" or "Plan").[1] Months after starting employment, Virgil and appellee Dana Profili ("Dana") married. They separated on June 16, 2015, after over twenty-five years of marriage.

In 2018, Dana filed a divorce action in the Circuit Court for Harford County. Gail Spielberger, Esq., represented Virgil. John Karas, Esq., represented Dana. On December 31, 2018, the parties entered into a marital settlement agreement ("MSA"). As detailed later, Virgil agreed to assign Dana fifty percent of the marital portion of his pension benefits with PepsiCo "as of June 16, 2016." Dana agreed to prepare the appropriate Qualified Domestic Relations Order ("QDRO") to effectuate the terms of the MSA.

In 2019, the circuit court entered a judgment of absolute divorce, which incorporated but did not merge the MSA. The judgment also provided that the court would retain jurisdiction until the QDRO was received and approved by the plan administrator. In 2020, the parties executed an "Amended QDRO" that was approved by the administrator and entered by the court.[2]

[1] For clarity, we shall refer to the parties by their first names. We mean no disrespect in doing so.

[2] The QDRO was titled "Amended QDRO" because prior versions that had been filed with the court contained errors related to the name of the plan and had to be amended.

The Amended QDRO directed the administrator to apply Dana's fifty percent of the marital portion to Virgil's vested accrued benefit as of June 1, 2020, when his benefit commenced. The administrator distributed the pension funds accordingly.

Virgil claimed that the Amended QDRO did not effectuate the terms of the MSA. He asserted that the MSA froze Dana's entitlement to the benefits as of June 16, 2016. He moved to enforce the MSA, alleging that Dana had received a windfall of approximately $177,000 and had breached the agreement by not repaying him this amount. In addition, he requested attorneys' fees under the MSA. Ultimately, the court denied Virgil's motion, determining that he agreed to the language in the Amended QDRO, that the Amended QDRO reflected the terms of the MSA, and that Dana had not breached it.

In this appeal, Virgil presents three questions for our review, which we have consolidated into one: Did the circuit court err in denying Virgil's motion to enforce the MSA?[3] For the reasons that follow, we shall vacate the judgment of the circuit court and remand the case for further proceedings.

[3] The questions as presented in Virgil's brief are:

1. Did the trial court err in its finding that "the language of the QDRO effectuates the terms of the MSA?"
2. Did the trial court err in its finding that [Dana] "has not breached the terms of the marital settlement agreement" and that Appellant "is not entitled to relief pursuant to the Further Assurances Clause"?
3. Did the trial court err when it failed to enforce the contractual provision in the parties' separation and marital settlement agreement providing for the payment of counsel fees in the event of a breach or default of that agreement?

I.

BACKGROUND

A.

Marital Settlement Agreement

Pertinent to this appeal is Paragraph 13 of the MSA, which sets forth Dana's rights in Virgil's pension:

> Husband acquired during the marriage a pension plan through his employer, PepsiCo, Inc. (the "Plan"). The amount to be assigned to Wife, as alternate payee, from the Plan shall be fifty percent (50%) of the **marital property portion** of Husband's monthly pension benefits under the Plan **as of June 16, 2016**, one year after the date of the parties' separation[.] **The marital property portion of the monthly pension benefit shall be a fraction of the total monthly accrued benefit**, and shall be defined as follows: the numerator shall be the total number of months of Husband's credited service under the Plan between the date of participation during the marriage and June 16, 201[6]; and the denominator of which shall be the total number of months of Husband's credited service under the Plan **up to June 16, 201[6[4]]**.

(emphasis added). The parties agree that the "marital property portion," as determined by the numerator and denominator described, amounts to 97.7%.[5]

Paragraph 13 also provides that the amount assigned to Dana shall be paid, as pertinent here, when Virgil receives any distribution from the Plan as a result of a termination of his participation in the Plan. It also required Dana to pay for the costs of

[4] The parties agree that the provision contains a typographical error that should reflect the year "2016."

[5] Using years instead of months, the numerator and denominator were 28.2055 and 28.8548 years, respectively. The resulting calculation was 28.2055/28.8548 = 0.977497678 (or 97.7%).

preparing a QDRO, obtain approval from the plan administrator, and file the QDRO with the court.

Under Paragraph 34, the parties agreed to "further assurances" in which they:

> mutually agree, within ten (10) calendar days of any request by the other party, to join in or execute any instruments and to do any other act or thing that may be necessary or proper to effectuate or carry out any part of this Agreement, or to release any dower or other rights in any property which either of said parties may now own or hereafter acquire, including the execution and delivery of such deeds, waivers, consents, and assurances as may be necessary to carry out the purpose of this Agreement.

Paragraph 37 provides for counsel fees in the event of a breach of the MSA:

> [I]f either party breaches any provision of this Agreement, or is in default thereof said party shall be responsible for any reasonable legal fees incurred by the other party in seeking to enforce this Agreement which are awarded by a court of competent jurisdiction.
>
> If either party shall breach any covenant or condition of this Agreement and the other party commences an enforcement action in [c]ourt, the party who is found by the court to have committed the breach shall pay unto the party commencing said action all reasonable counsel fees, court costs, deposition costs, and other related expenses, in connection therewith.

B.

Amended QDRO

Dana retained separate counsel to draft the QDRO. After negotiations, in which Virgil and Ms. Spielberger participated, the parties executed the Amended QDRO, which was approved by the plan administrator and accepted by the court.

In pertinent part, Paragraph 8 of the Amended QDRO provides the "amount of benefits to be paid" to Dana:

> A. . . . This Order assigns to the Alternate Payee [Dana] a separate interest in the Participant's [Virgil's] vested accrued benefit under the Plan, which shall

> be the actuarial equivalent of a portion of the Participant's **vested accrued benefit** to be calculated by the following formula: Fifty Percent (50%) of a fraction, the numerator of which is the number of years of Participant's credited service in the Plan accrued between April 3, 1988, the date of the parties' marriage and June 16, 2016, and the denominator of which is the total number of years of the Participant's credited service in the Plan accrued as of June 16, 2016. **This fraction will be applied to the Participant's vested accrued benefit as of the earlier of the Alternate Payee's benefit commencement date o[r[6]] the Participant's benefit commencement date**.

(emphasis added).

C.

Distribution of Pension Funds

By the time the Amended QDRO was entered by the court, PepsiCo had terminated Virgil's employment. Virgil elected to receive his pension benefits commencing June 1, 2020. The parties opted to receive a lump sum payment instead of monthly payments of their share of the pension funds. Based on this election, the plan administrator distributed a lump sum payment of $771,906.66 to Virgil and $715,134.75 to Dana. However, Virgil believed the amount he received was inconsistent with Paragraph 13 of the MSA. As a result, he submitted a formal request to the administrator to challenge the calculation.

On September 23, 2020, the plan administrator responded with an explanation of how Virgil's share of the lump sum was calculated. His monthly accrued benefit was calculated according to the Plan's standard formula, which equaled **$8,677.15**. Dana's

[6] The parties agree that this provision contains a typographical error that should read "or."

portion was calculated by taking fifty percent of the monthly accrued benefit and applying the marital fraction, resulting in $4,240.94 ($8,677.15 × 0.5 × 0.977497678).

Virgil's portion was offset by Dana's portion, equaling $4,436.21 ($8,677.15 - $4,240.94). This left Virgil with a net portion of $3,519.25, after multiplying his post-offset figure by a factor that accounted for his retirement at age 56 instead of age 62 or later. This figure represents the value of Virgil's pension had he opted for a monthly annuity for life. As noted, he chose to take the pension as a lump sum, which required multiplying the monthly annuity by a factor that accounted for Virgil's life expectancy and then-current interest rates. The final result was $771,906.66, the lump sum Virgil received from PepsiCo.

The letter from the plan administrator noted that "the estimated Accrued Benefit (AB) as of June 20, 2016 is **$6,599.33**. This is the estimated Single Life Annuity at your Normal Retirement Date (age 65) under the Plan." (emphasis added).

Virgil realized, based on the letter and other communications with the plan administrator, that the administrator applied fifty percent of the marital fraction to the pension's value as of June 1, 2020 ($8,677.15)—the date when the benefit commenced according to Paragraph 8.A of the Amended QDRO. However, he believed that the correct date for this calculation should have been applied to the accrued benefit as of "June 16, 2016" ($6,599.33), the date used in Paragraph 13 of the MSA.

D.

Motion to Enforce the MSA

Virgil attempted to resolve the alleged discrepancy with Dana but was unsuccessful. He engaged an actuarial expert, Marc Pushkin, to determine the amount of the discrepancy. According to Mr. Pushkin, the discrepancy totaled $176,703.39.[7] In 2021, Virgil retained new counsel, Michael Hamburg, Esq., and Harry Baumohl, Esq., to address what he believed was an overpayment to Dana.

On December 21, 2021, Virgil requested that Dana return the overpayment within ten days, citing his entitlement to counsel fees for breaches of the MSA. Dana disagreed with his interpretation and noted that the Amended QDRO was properly prepared and signed by him.

On January 10, 2022, Virgil filed a Motion to Enforce Agreement, claiming that Dana received more than she was entitled to. He argued that Dana was required to correct this under the further assurances provision in the MSA but failed to do so, which constituted

[7] Mr. Pushkin reviewed the September 23, 2020 document issued by PepsiCo. As stated, this document showed that Virgil's accrued benefit as of June 2020 was $8,677.15 per month and Dana's share was $4,240.94. He calculated Dana's share by applying the same multipliers to the "estimated" accrued benefit as of June 2016 ($6,599.33 per month), which equaled $3,225.41 per month. He then calculated the difference between Dana's share based on the Amended QDRO ($4,240.94) and her share based on the frozen approach purportedly set forth in the MSA ($3,225.41), which was $1,015.33 per month. Using the same early-retirement and lump-sum factors used to calculate Virgil's lump-sum payment, he calculated the overpayment of $176,703.39. Dana did not challenge these calculations.

a breach. Virgil requested an evidentiary hearing on the motion, an award in the amount of the overpayment, and attorneys' fees for enforcing the MSA.

On May 11, 2022, the court held a hearing on the motion. Regarding Paragraph 13 of the MSA, Virgil testified, "what we agreed to, was that the pension would be decided as of June 2016. That would be the point in time where [Dana] would get 50 percent of the value of the pension as of that date." Ms. Spielberger testified that Virgil had insisted on using June 16, 2016, representing one year after the date of separation. In contrast, Dana testified that when she signed the MSA, she believed the agreement was that she would receive half of Virgil's pension as of the date of his retirement. She indicated that she never "considered agreeing to freeze [her] interest in his pension to what it was worth in June of 2016 and still have to wait until he retired to get [her] share."

Virgil acknowledged that he negotiated the terms of the Amended QDRO but overlooked the language in Paragraph 8.A, proceeding based on his attorney's advice without understanding the consequences.

John Condliffe, Esq., was admitted as an expert in domestic relations, marital settlement agreements, pension plans, and associated qualified domestic relations orders. In relevant part, he explained that the Amended QDRO was "an implementing order, not the controlling document in this case." He confirmed that while the marital fraction was 97.7%, the issue was what it applied to. With the pension funds already disbursed, he stated that potential remedies included ordering Dana to pay the excess or reducing it to judgment against her.

Finally, Mr. Pushkin testified about his calculation of the discrepancy, totaling $176,703.39 (*see supra*, n.7), and Mr. Baumohl testified regarding the fees incurred by Virgil in enforcing the terms of the MSA.

E.

Court's Decision

On April 29, 2024, the court issued a Supplemental Memorandum Opinion and Order.[8] The court found that Dana did not breach the terms of the MSA and, as a result, Virgil was not entitled to relief under the further assurances provision in the MSA. The court stated that "[t]he language of Paragraph 13 of the MSA does not establish June 16, 2016 as the date from which the PEPSICO pension is to be valued and divided. The [c]ourt finds that the [Amended] QDRO then correctly reflects Paragraph 13 of the MSA."

In addition, the court pointed out that Virgil had consented to the language in the Amended QDRO, highlighting his awareness of and agreement to its provisions. Relying on *Pulliam v. Pulliam*, 222 Md. App. 578 (2015), the court explained that the MSA and Amended QDRO "are both enforceable contracts that should be interpreted using contract law." By applying the "concepts" of contract interpretation to the provisions in the Amended QDRO, the court concluded that the Amended QDRO clearly stated that Dana was entitled to receive fifty percent of the marital share of Virgil's entire pension benefit.

[8] Initially, the court issued a Memorandum Opinion and Order, ruling in Virgil's favor. Dana then filed for an in banc review. The panel reversed the court's decision in part and vacated in part, which resulted in a remand for the court to address various issues. Due to the remand, which led to the filing of the Supplemental Memorandum Opinion and Order, we do not need to elaborate on the court's initial decision.

Consequently, the court found that "it was reasonable for [Dana] to rely on the language of the [Amended] QDRO and collect her share of the pension." The court denied Virgil's motion to enforce, and Virgil noted this timely appeal.

II.

PARTIES' CONTENTIONS

On appeal, Virgil presents three main arguments. First, he argues that the court erred in finding that Paragraph 8.A of the Amended QDRO effectuates the language in Paragraph 13 of the MSA. Second, he argues that the court erred in finding that Dana did not breach the MSA. He contends that the language in the Amended QDRO did not conform to the MSA and that Dana was required to take corrective action under the further assurances provision in the MSA. He also argues that the court misapplied *Pulliam* by treating the Amended QDRO as an enforceable contract. He explains that the MSA was the controlling agreement, while the Amended QDRO served merely as the instrument to implement the parties' intentions regarding the distribution of the pension funds according to the MSA. Finally, Virgil argues that the court erred in denying his claim for attorneys' fees, which he contends should have been granted due to Dana's breach of the MSA.

Dana responds that the court properly found the language in the Amended QDRO to effectuate the terms of the MSA. She maintains that the court correctly determined she did not breach the MSA, and thus, Virgil was not entitled to relief under the further assurances provision. Dana states that her only obligation under Paragraph 13 of the MSA was to pay for the preparation of a QDRO, obtain its approval, and file it with the court, all

of which she fulfilled. Furthermore, she adds that even if Virgil's interpretation of the MSA were correct, the Amended QDRO effectively modified it. Finally, Dana asserts that since she did not breach the MSA, the court did not err in denying Virgil attorneys' fees under the MSA.

III.

STANDARD OF REVIEW

"[T]he initial step in the objective approach to contract interpretation is to determine whether the contract's meaning is plain and unambiguous." *Impac Mortg. Holdings, Inc. v. Timm*, 474 Md. 495, 507 (2021). We interpret settlement agreements in accordance with the principles of contract law. *Fultz v. Shaffer*, 111 Md. App. 278, 298 (1996). "The interpretation of a contract . . . is a question of law, subject to *de novo* review by an appellate court." *4900 Park Heights Ave. LLC v. Cromwell Retail 1, LLC*, 246 Md. App. 1, 19 (2020) (citation omitted). As we have explained:

> [W]e apply the objective theory of contract interpretation, wherein "the clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or was intended to mean." In applying the objective theory:
>
> > A court . . . must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

> A "contract is ambiguous if it is subject to more than one interpretation when read by a reasonably prudent person." But it is not ambiguous "merely because the parties thereto cannot agree as to its proper interpretation."

Pulliam, 222 Md. App. at 587–88 (citations omitted). "Contract provisions must be viewed in the context of the entire contract rather than construing each term separately." *Azat v. Farruggio*, 162 Md. App. 539, 550 (2005) (citation omitted).

Whether a party breached a contract, however, is a factual question that is reviewed under the clearly erroneous standard of review. *See Bontempo v. Lare*, 217 Md. App. 81, 136 (2014) (citation omitted).

IV.

OVERVIEW OF PENSIONS

Before discussing our analysis, it is helpful to provide a brief overview of pensions. The two most common types of retirement benefits are "defined contribution plans," such as a 401(k) and "defined benefit plans," such as a pension. *See* Linda J. Ravdin, *Property Disposition in Divorce and Annulment*, *in Maryland Divorce and Separation Law*, ch. 4, § II.F.3. (MICPEL 11th ed. 2023), Westlaw (footnotes omitted); *Dziamko v. Chuhaj*, 193 Md. App. 98, 114 n.16 (2010) (distinguishing between a defined contribution plan, such as a 401(k), and a defined benefit plan, such as a government pension that pays out a monthly benefit upon retirement).

Defined contribution plans "consist of money deposited by an employee along with, in some instances, an employer-matched monetary contribution, and the growth on these contributions through appreciation of share value and reinvested interest and dividends."

Ravdin, *supra*, ch. 4, § II.F.3. Defined contribution plans "maintain a separate account for each participant." *Id.* ch. 4, § III.F.2.b. "The value of the participant's interest in the plan is the account balance. The value is derived from contributions plus earnings, appreciation and forfeitures of other participants." *Id.*

In contrast, under a defined benefit plan, "the *future benefit* to be received is specified in advance and 'defined' by a benefit formula or benefit schedule." Steven R. Brown, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions*, 37 Baylor L. Rev. 107, 112 (1985). The projected retirement benefit typically commences at the participant's normal retirement age. Gary A. Shulman, Qualified Domestic Relations Order Handbook 23-9 (4th ed. 2023). "This benefit is calculated in accordance with a plan formula that often incorporates the participant's years of service and final average pay." *Id.* "The employer then makes regular, annual contributions to the plan during their employees' working careers in accordance with actuarial projections of the sums needed to fund such future, promised pension benefits." *Id.* Here, the Plan was a non-contributory, defined benefit plan.

This Court approved the *Bangs* formula to calculate the marital portion of a pension that was earned both during and outside the marriage. *Bangs v. Bangs*, 59 Md. App. 350, 356, 367–68 (1984). Applying this formula, the marital share of a pension is a fraction in which the numerator is the number of months of credited service during the marriage and the denominator is "the total number of months during which the pension accrues, from employment to retirement." *Dziamko*, 193 Md. App. at 116. "The non-member spouse's

share of the mar[ital] portion of the pension is determined by applying an agreed-upon fixed percentage to it. That fixed percentage then is applied to any future payments received under the pension plan."[9] *Id.* at 112.

In the context of judicial determinations, the *Bangs* formula has been deemed an equitable approach by our courts because it entitles the non-participant spouse (alternate payee) to post-divorce growth on their proportionate share of the pension. *See, e.g.*, *Kelly v. Kelly*, 118 Md. App. 463, 471–72 (1997) (disapproving husband's proposed modification to the *Bangs* formula that effectively froze wife's share of the pension as of the date of divorce in the context of a judicial determination). In other jurisdictions, the *Bangs* formula is commonly referred to as the "coverture" approach,[10] where the alternate payee's share of the benefits is based on the participant's accrued pension at retirement, not the date of divorce. *See* Shulman, *supra*, at 5-22.

Gary A. Shulman, a legal commentator on QDROs, articulated the equitable considerations behind the approach, stating that "[t]he use of the coverture approach is the only way to provide the alternate payee with inflationary protection on her ownership share of the pension." *Id.* at 2-17. The numerator of the fraction, representing the number of years

[9] This formula has been "codified as the default method in Maryland" under Family Law ("FL") § 8-204(b).

[10] The word "coverture" means "[t]he condition of being a married woman." *Coverture*, Black's Law Dictionary (12th ed. 2024). Some commentators have avoided use of the term because it "raises the specter of marriage under the common law of England in which the wife was merged into the husband and lost her legal persona." Elizabeth Barker Brandt, *Valuation, Allocation, and Distribution of Retirement Plans at Divorce: Where are We?*, 35 Fam. L.Q. 469, 472 n.17 (2001).

of service earned by the participant while married, remains constant. *Id.* The denominator represents all the participant's years of service at retirement. *Id.* "[A]s the participant continues to earn future years of credited service after the divorce, the denominator continues to grow by one each year." *Id.* at 2-17 to 18. Although the percentage share of the alternate payee's assignment decreases as the numerator stays the same, it is "applied to a larger pension as the participant's accrued benefit continues to grow." *Id.* at 2-18. "In essence, with each passing year after the divorce, the alternate payee is earning a smaller and smaller percentage of a larger pie." *Id.*

Certainly, "[i]n lieu of these judicial determinations, a divorcing couple may enter into an agreement for the allocation of their property, including retirement plan benefits," as the parties did in this case. *Robinette v. Hunsecker*, 439 Md. 243, 246 (2014) (citing FL § 8-101). One of the advantages of a settlement agreement is that parties are free to negotiate conditions that exceed what they would otherwise obtain after a trial or other contested proceeding. The parties are also free to agree to terms that might be to their detriment. *See Shallow Run Ltd. P'ship v. State Highway Admin.*, 113 Md. App. 156, 172 (1996) (explaining that "[p]eople are permitted to enter into contracts to their disadvantage"); *Nesbit v. Gov't Emps. Ins. Co.*, 382 Md. 65, 76 (2004) ("As a general rule, parties are free to contract as they wish." (citation and internal quotations omitted)). This could include resolving the division of a participant spouse's pension that does not conform to the *Bangs* formula.

Shulman identifies one such approach that divides a pension using a "frozen" coverture formula. *See* Shulman, *supra*, at 23-11. Under this approach, "the accrued benefit and denominator of the coverture fraction are both 'frozen' and determined as of [the] 'date of divorce,' and not the participant's date of retirement." *Id.* at 23-11 to 12 (emphasis omitted). The "alternate payee's share is . . . reduced by the application of an artificial coverture fraction look-alike determined as of the *date of divorce* (where the numerator equals the years of service earned during the marriage and the denominator equals the participant's service as of the date of divorce)." *Id.* "Basing the alternate payee's share of the pension on the employee's frozen accrued benefit means that she loses the benefits of any inflationary protection, even though she, too, may have to wait years to commence benefits." *Id.*

V.

DISCUSSION

We conclude that Paragraph 13 of the MSA is ambiguous because the language is subject to more than one interpretation when read by a reasonably prudent person. The phrase "as of June 16, 2016" in conjunction with limiting the denominator to Virgil's service time "up to June 16, 2016" could reasonably be construed as a "freeze" on Dana's share, providing her with fifty percent of the marital property portion of Virgil's accrued benefit as of that date.

However, the provision indicating that the "marital property portion . . . shall be a fraction of the **total** monthly **accrued benefit**" suggests otherwise. (emphasis added). The

emphasized language, not used elsewhere in the paragraph, is not limited by the date of June 16, 2016, as "monthly pension benefits" is in the previous sentence. The Plan describes "accrued benefit" as a calculation based on the participant's credited service, which "generally runs from [the participant's] start date to [his] separation from service date"; highest average monthly earnings; age "when benefit payments begin"; covered compensation, which "varies depending upon [the participant's] age and the year in which [he] terminate[s] employment"; vesting service; and age "when [he] terminate[s] employment."[11] In other words, "total monthly accrued benefit" suggests a period of accrual extending beyond June 16, 2016 and could reasonably be interpreted to mean that Dana's marital property portion should be applied to fifty percent of the marital property portion of Virgil's accrued benefit as of June 2020, when his benefits commenced.

The MSA lacks a provision as to what to do with the growth in the value of the pension between June 2016 and June 2020, when the benefits commenced. Dana argues that, under *Salkini v. Salkini*, 243 Md. App. 277 (2019), where the agreement is silent on how investment gains are distributed, the non-employee spouse is entitled to her share of investment earnings accumulated between the date of divorce and the date of distribution. Dana's reliance on *Salkini*, however, is unavailing under the circumstances here.

Salkini arose out of a contested divorce proceeding in which the court found that the husband's 401(k) retirement account was marital property. *Id.* at 279. Ultimately, the court

[11] "Accrued benefit" is "based on a plan formula and represents the monthly lifetime pension that the participant could receive commencing on an unreduced basis at his normal retirement age, which is usually 65." Shulman, *supra*, at 4-4.

ordered that the account "shall be divided equally between the parties **as of the date of divorce**." *Id.* at 283. The wife prepared a QDRO and included language that her interest "shall be adjusted for investment earnings or losses on her share from the valuation date to the date of segregation of [her] interest." *Id.* at 281. The husband refused to sign the QDRO, arguing that the wife's share did not include any investment earnings that had accumulated in the account during the years that had elapsed since the date of divorce. *Id.* at 282. The court, however, entered the QDRO with the language that the wife proposed, and the husband appealed. *Id.* at 282–83.

This Court construed the plain language of the court's judgment of divorce to mean that the corpus of the husband's 401(k) retirement account as of the date of the judgment of divorce was to be divided. *Id.* at 284. We disagreed with the husband's interpretation of the judgment, explaining that "[i]t [did] not follow from that language that any earnings that accrued in the account attributable to a delay in making the transfer of Wife's share would become Husband's sole property." *Id.* We reasoned that "[w]hen an alternate payee's share is expressed as a fraction or a percentage, the earnings in the account between the date of divorce and the date of segregation of the alternate payee's interest into a separate account would be derived from both parties' interests, not the original beneficiary's interest alone." *Id.* We further explained that "as a matter of equity, it was clearly the intent of the circuit court to divide this marital property equally between the spouses." *Id.*; *accord Rivera v. Zysk*, 136 Md. App. 607, 620 (2001) (holding that where the separation agreement provided wife half of husband's 401(k) account but was silent regarding allocation of post-

divorce gains or losses, it was "eminently fair" to award wife 50% of the increased value of husband's 401(k)).

Notably, we recognized in *Salkini* that a different conclusion may result depending on the language in a marital settlement agreement. *Salkini*, 243 Md. App. at 284; *see, e.g.*, *Allred v. Allred*, 243 Md. App. 286, 291 (2019) (where the MSA expressly addressed investment experience between date of execution and date of divorce). Unlike the language found in the consent judgment in *Salkini* or the settlement agreement in *Rivera*, Paragraph 13 did not merely express Dana's share in a percentage and remain silent about the growth of the pension after June 2016. Nor is it clear to what the parties intended to apply fifty percent of the marital property portion. As previously explained, the language of the MSA contains conflicting language; some language indicates that Dana's entitlement to the pension should be frozen as of June 2016, while other language suggests otherwise.

If contract language is ambiguous, "the meaning of the contract is a question to be determined by the trier of fact." *Stevenson v. Branch Banking & Tr. Corp.*, 159 Md. App. 620, 651 (2004) (citation omitted). In that case, the court considers extrinsic evidence "clarifying the parties' intentions at the time the contract is executed." *100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197, 234 (2013); *Impac*, 474 Md. at 507 (explaining that the court "is to consider admissible evidence that illuminates the intentions of the parties at the time the contract was formed"). "Even then, however, the parties 'will not be allowed to place their own interpretation on what it means or was intended to mean[.]'" *Stevenson*, 159 Md. at 651 (alteration in original) (quoting *Fultz*, 111 Md. App.

at 299); *Impac*, 474 Md. at 507–08 ("When addressing an ambiguous provision in a contract, the court will search to find mutuality and not a self-serving, unilateral construction of the contract." (citation and internal quotations omitted)). "Instead, the trier of fact must determine 'what a reasonable person in the position of the parties would have thought it meant.'" *Stevenson*, 159 Md. at 651 (quoting *Fultz*, 111 Md. App. at 299).

The Supreme Court of Maryland outlined the extrinsic evidence that the trier of fact could consider:

> To be admissible, extrinsic evidence of intent as to the meaning of a contract term must demonstrate an intent made manifest, not a secret intent at the time of contract formation. The parties' construction of the contract before the controversy arises can be an important aid, as can be the usage of the term in the parties' trade. And, communications between the parties about a contract subsequent to the execution of that contract may be admissible as evidence of an interpretation by both parties. However, retrospective, subjective, and unexpressed views about the contract are not proper extrinsic evidence: It is the intention of the parties as expressed in their words and the paper which they sign, not their own interpretation as to what their statements and acts were supposed to mean, which is determinative.

Impac, 474 Md. at 508 (citations and internal quotations omitted); *see also Canaras v. Lift Truck Servs., Inc.*, 272 Md. 337, 352 (1974) (explaining that such extrinsic factors include negotiations of the parties, the circumstances surrounding execution of the contract, and conduct of the parties); *Anne Arundel Cnty. v. Crofton Corp.*, 286 Md. 666, 673 (1980) (when contract is ambiguous, the trier of fact determines the intent and purpose of the parties by considering the circumstances and conditions affecting the parties at time of execution and their subsequent conduct and construction); *Nat'l Union Mortg. Corp. v. Potomac Consol. Debenture Corp.*, 178 Md. 658, 674 (1940) (construction placed on

contract by parties after execution and before controversy has arisen is extremely significant in determining intention).

Here, extrinsic evidence of the parties' intentions at the time the MSA was executed was not fully explored. This likely occurred because the parties asserted that the MSA was unambiguous. To resolve the current appeal based on the existing record would require us to assume that no such evidence is available. We reject this assumption because if such evidence does exist, our decision may not align with the parties' intentions.

For the reasons stated, we will vacate the judgment of the circuit court and remand the case for further proceedings for the parties to fully develop and present extrinsic evidence, if any, regarding the parties' intentions about whether Dana was to receive fifty percent of the marital property portion of the pension benefit as of June 16, 2016, or as of June 1, 2020. *See, e.g.*, *Heyda v. Heyda*, 94 Md. App. 91, 106 (1992) (remanding to the circuit court "for the limited purpose of permitting the parties to produce evidence of their intent in granting 'survivorship' benefits in [appellant's] pension to [appellee]," which was contained in a joint stipulation previously placed on the record); *Owings v. Foote*, 150 Md. App. 1, 17 (2002) (upon concluding that the text of agreement was ambiguous, this Court remanded case for further proceedings to elicit the intent of the parties regarding whether agreement governed payment of counsel fees for service rendered after a certain date).

Upon remand, if no extrinsic evidence is adduced by the parties or if such evidence is not persuasive to the circuit court on the above issue, "construction of the contract is a question of law for the court."[12] *Impac*, 474 Md. at 508.

Based on this disposition, we need not address the remaining issues and arguments. However, we are compelled to comment on the court's treatment of the Amended QDRO as an enforceable contract. Where, as here, the MSA was incorporated, but not merged into a judgment, "the agreement survives as a separate and independent contractual arrangement between the parties." *Janusz v. Gilliam*, 404 Md. 524, 539 n.10 (2008) (quoting *Johnston v. Johnston*, 297 Md. 48, 56 (1983)). "As such, after the entry of the final judgment, the [MSA] remained as an independent contract that the parties were free to modify, pursuant to the terms of their contractual arrangement." *Id.* Consistent with that, Paragraph 41 of the MSA provides that "[a]ll provisions of this Agreement shall be forever binding between the parties, and this Agreement can only be modified . . . by formal written instrument."

"A QDRO is required to transfer pension benefits from one beneficiary to another, either pursuant to the Marital Property Disposition Act, or through an attachment in aid of a support obligation." *Janusz*, 404 Md. at 538. A QDRO "can be either collateral to a

[12] Among the canons of construction "is that ambiguous language in a contract that is not clarified by extrinsic evidence or interpretive aids is construed against a party to the contract when that party drafted the language in question." *Impac*, 474 Md. at 509. Dana contends that this rule should apply, and Paragraph 13 should be construed against Virgil. We observe, without more, that Paragraph 42 of the MSA provides that "This Agreement has been drafted and prepared by both parties and should not, in the event of a dispute, be interpreted against one party or the other."

judgment as an avenue for enforcement or it can be an integral part of the judgment itself." *Potts v. Potts*, 142 Md. App. 448, 459 (2002). The parties agree that the Amended QDRO was an enforcement mechanism to effectuate Paragraph 13 of the MSA. Indeed, Paragraph 13 expressly states that the parties must execute documents "as may be necessary to effectuate the purposes of this Paragraph, including, but not limited to, having the terms of this Paragraph incorporated in a QDRO."

The court, however, concluded that the Amended QDRO was an enforceable contract based on its reliance on *Pulliam*. As Virgil asserts and Dana does not contest, the court's reliance on *Pulliam* for that proposition was misplaced. We agree and explain.

Pulliam centered on the interpretation of a consent judgment that outlined the terms of the parties' settlement agreement in a divorce case. *Id.* at 586. This consent judgment addressed the division of the husband's pension benefits, and the court had to determine whether his Deferred Retirement Option Program (DROP) benefit was subject to division according to the consent judgment. *Id.* The court concluded that it was, and it entered an eligible domestic relationship order ("EDRO," the equivalent of a QDRO for State of Maryland employees) that distributed the wife's share pursuant to the parties' agreement. *Id.* at 583–84. This Court affirmed the court's decision. *Id.* at 600. We explained that consent judgments entered by the parties and endorsed by the court have attributes of both contracts and judicial decrees. *Id.* at 587. We also noted that when interpreting the terms of a consent judgment, we apply standard principles of contract interpretation, as outlined in the Standard of Review above. *See id.* at 587–88.

Here, the court accurately extracted the principles of contract interpretation from *Pulliam*. However, it appeared to treat the Amended QDRO as a consent judgment when it concluded that the Amended QDRO constituted an enforceable contract. This connection, however, was flawed since we did not describe the *Pulliam* EDRO as a consent judgment or a contract; nor did we apply the principles of contract interpretation to the language in the EDRO, as the court did with the Amended QDRO.

Certainly, under some circumstances, a QDRO may modify a prior agreement between parties to a divorce. *Fischbach v. Fischbach*, 187 Md. App. 61, 95 (2009). In that situation, the QDRO constitutes an integral part of the judgment itself, and not merely an avenue for enforcement. *See Janusz*, 404 Md. at 539; *cf. Fischbach*, 187 Md. App. at 100–01 (concluding under the circumstances that the QDRO did not modify the parties' separation agreement). When it comes to modifying contracts, the Supreme Court of Maryland explained:

> The parties to a contract may agree to vary its terms and enter into a new contract embodying the changes agreed upon and a subsequent modification of a written contract may be established by a preponderance of the evidence. Assent to an offer to vary, modify or change a contract may be implied and found from circumstances and the conduct of the parties showing acquiescence or agreement.

Cole v. Wilbanks, 226 Md. 34, 38 (1961) (per curiam) (citations omitted). "[W]hether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact." *Hovnanian Land Inv. Grp., LLC. v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 122 (2011) (citation omitted). To determine whether a modification has occurred, a court looks to the totality of a party's

actions. *Id.* "Even if the relevant statements and communications of the parties are uncontested, the court must determine whether those statements (and actions) amounted to an understanding between the parties" to modify the terms of the agreement. *Id.* at 123. "[M]utual knowledge and acceptance, whether implicit or explicit," are required to modify a contract. *Id.* at 120.

Dana suggests that even if the parties intended to freeze her entitlement to Virgil's pension benefits as of June 2016 in the MSA, the Amended QDRO effectively modified the MSA to the contrary. However, we cannot resolve this issue given our decision to vacate and remand the case. If the issue of modification arises on remand, it will be up to the court to make this determination.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY VACATED; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.