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FILED
Oct 30 2009, 9:54 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF LISA J. LUTTERBACH,	)	
Appellant-Petitioner,	)	
vs.	)	No. 65A01-0812-CV-576
MICHAEL R. LUTTERBACH,	)	
Appellee-Respondent.	)	

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0508-DR-240

OCTOBER 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Lisa L. Lutterbach (Wife) appeals the trial court's order setting the valuation date for distribution of Michael R. Lutterbach's (Husband) 401(k) account on the date Wife filed the petition for dissolution rather than the date of the Mediated Summary Dissolution Decree. We affirm.

The sole issue for our review is whether the trial court erred in setting the valuation date.

Wife filed a petition for dissolution on August 5, 2005. Husband and Wife participated in mediation, and on May 2, 2008, the parties and the mediator submitted the parties' Mediated Agreement (the Agreement) to the court for approval. The court approved the Agreement that same day. Paragraph 7.2 of the Agreement provides in relevant part as follows:

> That the Husband is a participant in a 401(k) account through his employer. That said 401(k) account accrued to the Husband during the course of the marriage. The Court does hereby create and/or recognize the existence of the Wife's right to receive as an alternate payee all but One Hundred Fifty Thousand Dollars ($150,000.00) of the benefits payable to the participant under said plan. The Wife's right to receive a portion of the Husband's benefits under said plan arises by virtue of the marital property rights due to the Wife herein pursuant to the provisions of I.C. 31-15-7 et seq. . . .

Appellant's App. at 67.

Shortly thereafter, Husband filed a Petition for Judicial Determination of Date of Valuation for Distribution of Property Settlement wherein he advised the court that the parties had a conflict as to the applicable date for the purpose of distribution of Husband's 401(k) set forth in the Agreement. Husband asked the court to determine the

date of valuation for distribution of the 401(k) account. The trial court ordered the parties to submit proposed entries and briefs on the issue. In the brief in support of his motion, Husband argued that the proper valuation date was August 5, 2005, the date the Wife filed the petition for dissolution. Wife responded that an examination of the four corners of the Agreement established that the valuation date was May 2, 2008, the date the parties executed the Agreement.

The trial court concluded as follows:

> IC 31-15-7-4 mandates that the trial court divide the property of the parties, whether:
>
> (1) owned by either spouse before marriage;
> (2) acquired by either spouse in his or her own right;
> (a) after the marriage; and
> (b) before final separation of the parties; or
> (3) acquired by their joint efforts.
>
> In the case at Bar, IC 31-15-7-4(2) is applicable. Husband's 401K account is a marital asset. It was acquired by Husband in his own right after the marriage and before the final separation.
>
> Wife filed her Petition for Dissolution of Marriage August [5], 2005. That was the date of final separation.
>
> In *Keown v. Keown*, 883 N.E.2d 865, 871 (Ind. Ct. App. 2008), it was held:
>
> > The marital estate includes assets and liabilities. It closes on the date the dissolution petition is filed and debts [and, per force, assets] incurred [accumulated] by one party after that date are not to be included in the marital estate.
>
> The proper date for the distribution is August [5], 2005.

Appellant's App. at 9-10. Wife appeals.

At the outset we note that Husband asks us to dismiss Wife's appeal because Wife failed to comply with Indiana Rule of Appellate Procedure 10(F) when she failed to request relief when the clerk's portion of the record was not timely filed with the Clerk of the Indiana Supreme Court. However, we prefer to decide cases on their merits when possible. *Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), *trans. denied*. We therefore decline Husband's request and turn to the merits of this case.

Wife contends that the trial court erred in setting the valuation date. Specifically, she argues that "[a]n examination of the four corners of the Mediated Agreement illustrates that the parties unambiguously expressed their intention to divide Husband's 401(k) account as of the date the trial court approved the Mediated Agreement and made it an agreed decree – May 2, 2008." Appellant's Br. at 4.

Upon dissolution of marriage, parties are free to craft their own settlement agreement and such agreements are contractual in nature and binding. *Kiltz v. Kiltz*, 708 N.E.2d 600, 602 (Ind. Ct. App. 1999), *trans. denied*. Parties are free to divide their property in any way they choose and their agreement in that regard is interpreted as any other contract. *Id.* General rules applicable to construction of contracts govern construction of marriage settlement agreements. *Id.*

The interpretation and construction of contract provisions is a function for the courts. *Id.* On appeal, our standard of review is the same as that employed by the trial court. *Id.* Unless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning. *Id.* The terms of a contract are not ambiguous merely because

controversy exists between the parties concerning the proper interpretation of the terms. *Id.* Where the terms of a contract are clear and unambiguous, the terms are conclusive and we will not construe the contract or look at extrinsic evidence but will merely apply the contractual provisions. *Id.*

Here, our review of the contract terms reveals no ambiguity, and the record contains no evidence that the trial court considered the terms to be ambiguous. Thus, we merely apply the contractual provisions. Paragraph 7.2 of the Agreement provides in relevant part as follows:

> That the Husband is a participant in a 401(k) account through his employer. That said 401(k) account accrued to the Husband during the course of the marriage. The Court does hereby create and/or recognize the existence of the Wife's right to receive as an alternate payee all but One Hundred Fifty Thousand Dollars ($150,000.00) of the benefits payable to the participant under said plan. The Wife's right to receive a portion of the Husband's benefits under said plan arises by virtue of the marital property rights due to the Wife herein pursuant to the provisions of I.C. 31-15-7 et seq. . . .

Appellant's App. at 67.

Clearly, the parties agreed and intended that Wife's right to receive a portion of Husband's 401(k) benefits arose by virtue of the statutory marital property rights found at Indiana Code Section 31-15-7 et seq. Pursuant to Indiana Code Section 31-15-7-4(a), all marital property goes into the marital pot for division. *Webb v. Schleutker*, 891 N.E.2d 1144, 1149 (Ind. Ct. App. 2008). The determinative date when identifying marital property subject to division is the date of final separation, in other words, the date the petition for dissolution was filed. *Id.* Here, the petition for dissolution was filed on

August 5, 2005. The trial court did not err in setting this date as the valuation date for Husband's 401(k) account.

Affirmed.

RILEY, J., and BROWN, J., concur.