2016 IL App (3d) 150355-U

Order filed January 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
CHETNA TIWARI,	)	Will County, Illinois,
	)	
Petitioner-Appellee,	)	
	)	Appeal No. 3-15-0355
and	)	Circuit No. 12-D-2257
	)	
UMESH K. TIWARI,	)	Honorable
	)	Dinah L. Archambeault,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in finding that the marital settlement agreement did not permit respondent to retain gains on certain nonmarital funds contained in a retirement account along with marital funds.

¶ 2 Following the circuit court's entry of a judgment of dissolution of marriage, respondent, Umesh K. Tiwari, filed a motion asking the circuit court to permit him to retain gains which accrued during the marriage in a retirement account that contained both marital and nonmarital

funds. The trial court denied respondent's motion, finding that the marital settlement agreement signed by the parties did not allow respondent to retain said gains. We affirm.

¶ 3 FACTS

¶ 4 Respondent and petitioner, Chetna Tiwari, were married on March 10, 1999. A judgment for dissolution of marriage was entered on October 16, 2014. A marital settlement agreement (MSA) executed by the parties on the same date was incorporated into the judgment for dissolution of marriage.

¶ 5 Under the terms of the MSA, certain Vanguard Individual Retirement Arrangements (IRA) accounts owned by respondent were to be divided between the parties with each party receiving a 50% share. The MSA provided:

> "[Respondent] contributed the sum of SIXTY ONE THOUSAND SIX HUNDRED EIGHTEEN AND 99/100 DOLLARS ($61,618.99) from his non-marital retirement funds into [one of the Vanguard accounts]. Said amount shall not be included when determining the respective one half marital share awarded to each party and said set sum shall be awarded to [respondent] subject to gains or losses incurred subsequent to October 16, 2014."

The transfer of petitioner's one half marital share of the funds contained in respondent's Vanguard IRA accounts was to be effectuated by a Qualified Domestic Relations Order (QDRO).

¶ 6 Respondent filed a "Motion to Separate Gains on Non-Marital Funds Before Dividing the Asset." In said motion, respondent asked the court to clarify the instructions for drafting the QDRO for his Vanguard accounts to allow respondent to retain the gains on the $61,618.99 in nonmarital funds contained in his Vanguard account that had accrued since the funds were

deposited in the account on May 2, 2012. The motion alleged that respondent believed that the circuit court had agreed that he was entitled to gains on the nonmarital portion of the account.

¶ 7 A hearing on the motion was held on May 12, 2015. Respondent explained that a nonmarital retirement fund remained separate from marital funds until May 2, 2012. On that date, respondent rolled marital funds into the same account as the nonmarital funds. At that time, the value of the nonmarital funds was $61,618.99. Respondent asserted that the marital and nonmarital funds in the account totaled $395,000 at the time they were comingled but totaled $550,000 at the time of the hearing. Respondent asserted that no funds were added or removed from the account after May 2, 2012. Respondent argued that the nonmarital funds comprised of 15.58% of the total funds on May 2, 2012, so he was entitled to 15.58% of the gains on the account since that date.

¶ 8 Respondent contended that it was the circuit court's intent to award him the $61,618.99, as well as the growth associated with that amount. Respondent attempted to introduce a page of a transcript during which the circuit court purportedly stated that he would be entitled to gains on the nonmarital portion of his Vanguard IRA account. Petitioner objected, arguing that the MSA controlled and respondent could not introduce parol evidence. The circuit court agreed that the MSA controlled the issue.

¶ 9 The circuit court denied respondent's motion. The court reasoned that the terms of the MSA only awarded defendant $61,618.99 subject to gains and losses incurred after October 16, 2014. Respondent asked if he lost the growth on the $61,618.99 between May 2, 2012, and October 16, 2014. The circuit court replied, "That's what this judgment says that you signed. That's what it says."

¶ 10 Respondent filed a notice of appeal to which he attached a copy of the transcript page that he attempted to offer at the hearing. The complete transcript of the hearing was not included in the report of proceedings on appeal. Respondent also attached various statements from Vanguard recording the amount of funds in the account at issue on various dates. These documents were not admitted during the hearing.

¶ 11 ANALYSIS

¶ 12 Initially, we note that petitioner did not file an appellee's brief. We will address the merits of this appeal; however, under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (holding that a reviewing court should decide the merits of an appeal where the record is simple and the claimed errors are such that the reviewing court can decide them without the assistance of an appellee's brief).

¶ 13 On appeal, respondent argues that the trial court erred in denying his "Motion to Separate Gains on Non-Marital Funds Before Dividing the Asset." Respondent contends that "a simple clerical error" occurred in the MSA. Respondent argues that the MSA should have provided that he was entitled to gains on the nonmarital funds from the date the nonmarital funds were commingled with the marital funds (May 2, 2012) rather than the date of execution of the agreement (October 16, 2014).

¶ 14 At the outset, we note that respondent, in an attempt to support his argument, only cites to the transcript page and other documentation that he attached to his notice of appeal. These documents are not part of the record on appeal. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 323 (eff. Dec. 15, 2005). As such, we do not consider these documents when deciding the disposition of this appeal. See *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 26

("[I]t is well settled that matters not properly part of the record and not considered by the court in the proceedings below will not be considered on review even if they are included in the record.")

¶ 15 When interpreting a marital settlement agreement, courts seek to give effect to the intent of the parties. *Allton v. Hintzsche*, 373 Ill. App. 3d 708, 711 (2007). "When the language of a divorce settlement is contained in or incorporated into the judgment of divorce, and where that language is clear and unambiguous, the intent of the parties is determined solely from the language of the agreement." *In re Marriage of Allen*, 343 Ill. App. 3d 410, 413 (2003). The language of an agreement is ambiguous when it is susceptible to more than one reasonable interpretation. *Allton*, 373 Ill. App. 3d at 711. We review *de novo* the circuit court's interpretation of a marital settlement agreement. *Id.*

¶ 16 Here, the language of the MSA was unambiguous. The relevant term of the MSA clearly stated that the set sum of $61,618.99 was not to be included in the calculation of the one-half marital shares from the respondent's Vanguard IRA accounts. Rather the set sum of $61,618.99 was to be awarded to respondent subject to gains and losses incurred after October 16, 2014. The clear language of the MSA did not award respondent gains on the sum of $61,618.99 that were incurred between the time said funds were commingled with the marital funds and the time the MSA was executed. Thus, it was proper for the trial court to deny respondent's motion.

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Will County is affirmed.

¶ 19 Affirmed.