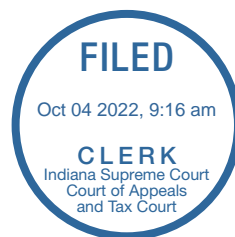


MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Angela Fay Ross,
Appellant-Respondent,

v.

Jason Noel Ross,
Appellee-Petitioner.

October 4, 2022

Court of Appeals Case No.
22A-DC-761

Appeal from the Hendricks
Superior Court

The Honorable Rhett M. Stuard,
Judge

Trial Court Cause No.
32D02-2007-DC-425

Mathias, Judge.

- [1] Angela Fay Ross (“Wife”) appeals the Hendricks Superior Court’s decree of dissolution of her marriage to Jason Noel Ross (“Husband”). Wife raises a single issue for our review, which we restate as whether the trial court erred as a matter of law when it excluded from the marital estate retirement pension

benefits in which Husband vested only after he had filed his petition for dissolution. As the Indiana Code is unambiguous that such benefits are not marital property, we affirm the trial court's judgment.

Facts and Procedural History

- [2] Husband and Wife were married in September 2008. During the entirety of their marriage, Husband worked as a police officer. Part of his regular income went toward the 1977 Police and Firefighter Fund, a retirement pension (“the pension”).
- [3] On July 27, 2020, Husband filed a petition for the dissolution of the marriage. As of that date, he had not yet vested in the pension's benefits, and his pension had a cash value of \$91,124.88. That is, Husband's pension amount consisted solely of his “contributions . . . with interest,” and, if Husband had “quit [his] job on the day” he filed his petition for dissolution, he would have received only that amount for the pension. Tr. Vol. 2, pp. 67-68.
- [4] Husband and Wife attempted to resolve their dissolution through mediation, but in January 2021 the mediator reported to the trial court that mediation had failed without an agreement. Husband requested a final hearing on his petition, and the court set that hearing for May 26, 2021.
- [5] On May 19, Wife filed a motion to continue the final hearing. The trial court granted her request and reset the final hearing for October 6. The day before the October final hearing date, Wife again moved to continue the hearing. Over

Husband's objection, the court granted Wife's motion and reset the final hearing for February 10, 2022.

[6] On February 4, 2022, Husband vested in his pension's benefits. The value of Husband's vested benefits on that date was \$1,031,734.63. At the final hearing six days later, Wife asked the court to include Husband's pension benefits in the marital estate. Husband asked the court to exclude the pension benefits and to include in the marital estate only the cash value of the pension as of the date of his petition for dissolution.

[7] Following the final hearing, the court entered its decree of dissolution. In relevant part, the court found and concluded that the date of Husband's filing of the petition for dissolution controlled the date for defining the marital estate. The court reasoned that the marital property is the property held by the parties as of the date the petition for dissolution is filed, and that property acquired after that date is generally not marital property as a matter of law. The court further concluded that the vested benefits of Husband's pension did not exist as of the date of the filing of the petition for dissolution; only a pension with a cash value existed at that time. The court thus found that only the cash value of Husband's pension was within the marital estate, which, again, had a value of \$91,124.88. This appeal ensued.

Discussion and Decision

[8] Wife frames her argument on appeal as whether the trial court erred in its valuation of Husband's pension. However, while Wife couches her argument in

terms of the date used to value Husband’s pension, the trial court’s judgment turned on the extent to which the pension was marital property subject to division. Thus, the issue on appeal turns on the statutory definition of marital property, which is a question of law we review de novo. *See, e.g., Southlake, Ind., LLC v. Lake Cnty. Assessor*, 174 N.E.3d 177, 179 (Ind. 2021).

[9] [Indiana Code section 31-15-7-4\(a\) \(2021\)](#) provides that a dissolution court shall divide the “property” of the parties, whether:

- (1) owned by either spouse before the 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.

(Emphases added.) [Indiana Code section 31-9-2-46](#) generally defines “[f]inal separation” as “the date of filing of the petition for dissolution of marriage” And [Indiana Code section 31-9-2-98\(b\)](#) defines “property” under our dissolution statutes to include:

- (1) *a present right to withdraw pension or retirement benefits;*
- (2) *the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in*

Section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage; and

(3) the right to receive disposable retired or retainer pay (as defined in 10 U.S.C. 1408(a)) acquired during the marriage that is or may be payable after the dissolution of marriage.

(Emphases added.)

[10] As we have explained:

Generally, the marital pot closes on the day the petition for dissolution is filed. *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1192 (Ind. Ct. App. 2001). *The date of filing is defined by statute as the date of “final separation.”* Ind. Code § 31-9-2-46. Some earlier panels of this court appear to have identified marital property subject to division in dissolution proceedings as of the date of dissolution. *See Wyzard v. Wyzard*, 771 N.E.2d 754, 757 (Ind. Ct. App. 2002) (referring to husband’s entitlement to vested pension benefits “at the time of the dissolution order” when reviewing the trial court’s valuation of the pension); *Skinner v. Skinner*, 644 N.E.2d 141, 146 (Ind. Ct. App. 1994) (holding that “at the time of dissolution, the unvested portion of a pension plan that is only partially vested is not divisible marital property[;]” equating “date of dissolution” with date of “final separation”); *In re Marriage of Hughes*, 601 N.E.2d 381, 383 (Ind. Ct. App. 1992), (holding husband’s early retirement supplement “is a pension or retirement benefit which, at the time of the dissolution, [husband] had a right to receive and which would not be forfeited upon termination of his employment.”), *trans. denied*. However, [Indiana Code Section 31-15-7-4\(a\)\(2\)\(B\)](#) provides that only property acquired by either or both parties *before* the date of final separation is marital property subject to division in dissolution proceedings. *Thus, 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.

To be included as marital property subject to division in dissolution proceedings, pension benefits must, on the date of final separation, not be forfeitable upon the termination of employment or they must be vested, whether payable before or after the dissolution. See *id.*; *Sanjari*, 755 N.E.2d at 1192. . . .

* * *

. . . An asset must first constitute marital property as defined under [Indiana Code Section 31-9-2-98](#) before it requires valuation. . . . *[T]he enhanced portion of Husband's pension is not marital property subject to division because, as of the date the petition for dissolution was filed, the enhancement was forfeitable upon termination of Husband's employment and it was not vested. See Ind. Code § 31-9-2-98(b). The fact that the pension enhancement had vested by the final hearing date did not bring the enhancement into the marital estate for valuation purposes and division. Thus, the trial court did not abuse its discretion when it did not include the enhancement when determining the value of Husband's pension.*

Granzow v. Granzow, 855 N.E.2d 680, 683-85 (Ind. Ct. App. 2006) (emphases added).

[11] Our analysis of the relevant statutes in *Granzow* is equally applicable here. On the date Husband filed the petition for dissolution, he had only a present right to withdraw the cash value of his pension, that is, his contributions and the interest thereon. That value was \$91,124.88. Husband further testified that, if he

had lost his employment on the date he filed his petition for dissolution, he would have forfeited his pension benefits beyond that value.

[12] Thus, as a matter of law, the only component of Husband’s pension that was marital property was the cash value of \$91,124.88. The unvested pension benefits that Husband would have forfeited had he lost his employment at that time were not marital property. As in *Granzow*, “[t]he fact that the pension enhancement had vested by the final hearing date did not bring the enhancement into the marital estate” *Id.*

[13] Still, on appeal Wife relies in significant part on our Supreme Court’s opinion in *In re Marriage of Adams*, 535 N.E.2d 124 (Ind. 1989). In *Adams*, our Supreme Court held that husband “did not have a present right to withdraw pension benefits because he had not yet retired” and that husband’s pension “was not within” what is now [Indiana Code section 31-9-2-98\(b\)\(3\)](#). *Id.* at 126. However, the Court held that, because the terms of husband’s pension made his pension “not forfeited upon termination” based on his years of employment, his pension did qualify as marital property under what is now [Indiana Code section 31-9-2-98\(b\)\(2\)](#). *Id.*

[14] Our Supreme Court’s analysis in *Adams* is readily distinguishable. Again, Husband testified that, if he lost his employment on the date he filed his petition for dissolution, he would not have been entitled to any pension benefits beyond the cash value. Accordingly, Wife’s reliance on *Adams* is misplaced.

[15] Wife also asserts that Husband's pension benefits were the product of their joint efforts during the marriage. We agree, but only up to the date of Husband's filing of the petition for dissolution, at which time the pension had a value of \$91,124.88. And Wife presented no evidence, nor does she argue with citation to authority, that Husband's use of his own income after the date of his filing of the petition for dissolution to contribute to his pension was a joint effort.

[16] We hold that the trial court properly considered only the cash value of Husband's pension as marital property and properly excluded from the marital estate the value of the pension benefits in which Husband vested only after he had filed the petition for dissolution. We therefore affirm the trial court's judgment.

[17] Affirmed.

Robb, J., and Pyle, J., concur.