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**IN THE  
COURT OF APPEALS OF INDIANA**

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AMY ROGERS, )  
 )  
 Appellant-Petitioner, )  
 )  
 vs. ) No. 29A05-1105-DR-221  
 )  
 MICHAEL DURAND, )  
 )  
 Appellee-Respondent. )

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable J. Richard Campbell, Judge  
The Honorable William P. Greenaway, Magistrate  
Cause No. 29D04-0909-DR-2160

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**December 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Amy Rogers (“Wife”) appeals the trial court’s order granting a motion to correct errors filed by Michael Durand (“Husband”). Wife raises two issues, which we consolidate and restate as whether the court erred in granting Husband’s motion. We affirm.

The relevant facts follow. Husband and Wife were married in October 1991. In September 2009, Wife filed a petition for dissolution of marriage, and the court ordered the parties to mediation in June 2010. In December 2010, the parties filed a Waiver, Decree of Dissolution of Marriage, Agreement of Settlement, and Judgment Entry (the “Settlement Agreement”), which the court approved.

Paragraph 2.1(d) of the Settlement Agreement provides:

Wife shall receive by Qualified Domestic Relations Order (QDRO) from Husband’s American Funds 401(k) the stated sum by cash or cash equivalent of \$69,900.14 without regard to market gains and losses since November 30, 2010. Husband shall pay any administrative fees associated with the transfer of funds. The Wife’s attorney shall prepare the QDRO and submit it to Husband’s attorney for approval prior to submission to the Court. It is intended by the parties that the exchange of property, or payments required to be made from this account by the Husband to the Wife shall not be considered a taxable event, or cause a tax consequence to the Wife as this is part of the marital property distribution.

Appellant’s Appendix at 20. In addition, Paragraph 6.10 of the Settlement Agreement provides:

It is intended that the sale or exchange of property, or payments required to be made herein by either party, shall not be considered a taxable event, or cause a tax consequence to either party. The parties acknowledge that their legal counsel are not tax consultants and that this Agreement may have tax consequences for them irrespective of the language stated in this Agreement. While they may have discussed tax matters with their attorney, they have individually consulted their own CPA, or have had the opportunity to consult with their own CPA or other tax advisor, to determine how this Agreement affects their individual tax situation.

Id. at 27.

On January 11, 2011, Wife filed a QDRO with the court.<sup>1</sup> Paragraph 12 of the QDRO submitted by Wife provided:

The Alternate Payee [Wife] shall receive her benefit in the form of a one-time, lump sum cash payment. If so instructed by the Alternate Payee the Plan Administrator shall distribute the funds to an I.R.A. or other qualified plan designated in writing by the Alternate Payee.

Id. at 35. Paragraph 15 of the QDRO provided:

The Participant [Husband] shall be responsible for the payment of all taxes incurred by reason of the separation of benefits from the Plan. The Plan Administrator shall provide the Participant and Alternate Payee with appropriate tax information so as to enable the Participant Payee and Alternate Payee to report and pay any applicable tax.

Id. Also on January 11, 2011, Husband filed an objection to the submitted QDRO and argued that it did not conform to the parties' Settlement Agreement. On January 12, 2011, the court signed and approved the QDRO submitted by Wife. On January 18, 2011, Wife filed a response to Husband's objection.

On January 24, 2010, Husband filed a motion to correct errors. Husband's motion noted that the Settlement Agreement required Wife's counsel to submit a QDRO to Husband's counsel for approval prior to filing it with the court and alleged that it was unreasonable for Wife's counsel to submit the QDRO to the court after giving Husband's counsel one working day to review the document. Husband argued that the language in Paragraph 15 of the QDRO should not have been included because the Settlement

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<sup>1</sup> The QDRO was titled "Amended Qualified Domestic Relations Order," but it appears that no previous QDRO had been filed. See Appellant's Appendix at 31.

Agreement did not state that Husband was responsible “for any tax consequences as a result of the separation of funds and/or as a result of the action by [Wife] should she decide to withdraw the funds in a manner that forces a taxable event.” Id. at 9. Husband requested the court to vacate the QDRO signed by the court on January 12, 2011 and order Wife to submit a QDRO consistent with the parties’ Settlement Agreement.

On February 14, 2010, Wife filed a statement in opposition to the motion in which she argued that the Settlement Agreement provides that Wife “has the right to decide the manner by which to withdraw the funds,” and that “[t]he parties intended and the [Settlement Agreement] provides that [Husband] is responsible for any taxable event or tax consequence as a result of her receipt of the stated sum of \$69,900.14 by cash or cash equivalent from [Husband’s 401(k).” Id. at 87-88.

Following a hearing, the court entered an order on April 8, 2011, finding in part:

9. In brief. [sic] It is Wife’s contention that Husband must pay all the tax required relating to the division of the 401(k) to allow Wife to receive the net amount of Sixty-Nine Thousand Nine Hundred Dollars and Ninety Cents (\$69,900.90) [sic]. It is Husband’s contention that once the Sixty-Nine Thousand Nine Hundred Dollars and Ninety Cents (\$69,900.90) [sic] is removed from his 401(k), that Wife is responsible for all tax consequences thereon, especially in light of her election to take it as a cash payment, thus incurring a considerable tax penalty.
10. The transfer of funds itself from the 401(k) to Wife is not taxable in and of itself. It is Wife’s election to take those funds as a cash distribution that has caused the tax consequences, and no amount of waivers can changed [sic] the fact that there is a significant tax consequence for that action.
11. The [Settlement Agreement] is specific that [Wife] receive “Cash or cash equivalent” from the 401(k) by QDRO. This provision simply does not mention Wife receiving those funds into a separate retirement vehicle. However, the inclusion of the requirement for a

QDRO is telling. It is the QDRO that allows the 401(k) to be split without tax consequence to the Participant. If Item 2.1(d) of the decree were rewritten to exclude the QDRO language, it would read as follows:

Wife shall receive from Husband's American Funds 401(k) the stated sum by cash or cash equivalent of \$69,900.14 without regard to market gains and losses since November 30, 2010. Husband shall pay any administrative fees associated with the transfer of funds. It is intended by the parties that the exchange of property, or payments required to be made from this account by the Husband to the Wife shall not be considered a taxable event, or cause a tax consequence to the Wife as this is part of the marital property distribution.

12. Clearly, under this rewriting, Husband is responsible for the tax consequence, as he is giving Wife a sum certain in cash taken from his 401(k). As the Participant, he is withdrawing the funds and transferring them to Wife. In this rewriting the language regarding the tax consequence falling on Husband makes perfect sense. In actual writing that contains both the QDRO language and the tax consequence language, there is an inconsistency, because if Husband were to pay the tax and penalty, the need for a QDRO is redundant.
13. The Court notes that the language of Item 2.1(d) simply does not contain an express provision that Husband is responsible for the tax consequence. It merely states that the transfer is not a tax consequence on Wife. As stated above, if Wife takes the money in cash after distribution per a QDRO, no amount of waiver is going to change that it is a tax consequence to her based upon that election.
14. The Court finds that Wife is responsible for the tax consequences of electing to take the funds from the 401(k) in cash after distribution pursuant to the QDRO.

Id. at 84-85. The court granted Husband's motion to correct errors, vacated the QDRO signed by the court on January 12, 2011, and ordered counsel for Husband to submit a QDRO consistent with the terms of the order.

The issue is whether the court erred in granting Husband's motion to correct errors. To decide the issue we look to the language of the Settlement Agreement. When construing the meaning of a contract, our primary task is to determine and effectuate the intent of the parties. Whitaker v. Brunner, 814 N.E.2d 288, 293 (Ind. Ct. App. 2004), trans. denied. The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. Id. If the language of the instrument is unambiguous, the parties' intent will be determined from the four corners of the contract. Id. at 293-294. We read the contract as a whole and will attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. Id. We must accept an interpretation of the contract that harmonizes its provisions, rather than one that places the provisions in conflict. Id.

A QDRO is a judgment, decree, or order which relates to the provision of child support, alimony, or marital property rights for a spouse, former spouse, or dependant of a participant and creates a right in this person to receive all or a portion of the benefits payable to the pension participant. Pond v. Pond, 700 N.E.2d 1130, 1134 n.8 (Ind. 1998) (citing I.R.C. § 414(p) (1993)). A QDRO is authorized under the Retirement Equity Act of 1984. Id. The Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1433 (1984), amended the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq., to authorize state courts to order the distribution of pension benefits in divorce actions pursuant to a QDRO. Id.

The Settlement Agreement contained sections addressing the parties' various property interests, debts, and expenses, including their real property, personal property,

bank accounts, motor vehicles, and Husband's retirement account. Under Paragraph 2.1, titled "Wife's Property," the parties agreed that Wife would become or continue to be the sole owner of certain identified property, which included subsection (d) providing:

Wife shall receive *by Qualified Domestic Relations Order (QDRO)* from Husband's American Funds 401(k) the stated sum by cash or cash equivalent of \$69,900.14 without regard to market gains and losses since November 30, 2010. Husband shall pay any administrative fees associated with the transfer of funds. The Wife's attorney shall prepare the QDRO and submit it to Husband's attorney for approval prior to submission to the Court. *It is intended by the parties that the exchange of property, or payments required to be made from this account by the Husband to the Wife shall not be considered a taxable event, or cause a tax consequence to the Wife as this is part of the marital property distribution.*

Id. at 20 (emphases added).

While Paragraph 2.1(d) includes language that Wife shall receive "by cash or cash equivalent" an amount from Husband's 401(k) the clear implication of the language requiring the use of a QDRO and that the exchange of property "shall not be considered a taxable event" is that the parties intended that neither party incur a tax liability in connection with the transfer of the sum awarded to Wife. See id. Moreover, the parties agreed to the terms of Paragraph 6.10 of the Settlement Agreement, which provides that the parties "intended that the sale or exchange of property, or payments required to be made herein by either party, shall not be considered a taxable event, *or cause a tax consequence to either party.*" Id. at 27 (emphasis added). This provision further supports the conclusion that it was the intention of the parties that the transfer of funds to Wife would not cause a tax consequence to Husband.

Based upon the record and the Settlement Agreement, we cannot say that the trial court erred as a matter of law in finding that the parties did not intend for Husband to

incur a tax liability in connection with Wife's possible election to withdraw or disburse from Husband's or her retirement plan or account the funds awarded to her pursuant to the Settlement Agreement. See Von Haden v. Supervised Estate of Von Haden, 699 N.E.2d 301, 305-306 (Ind. Ct. App. 1998) (interpreting the language in the property settlement agreement and finding that the trial court's determination was consistent with the apparent intent of the parties as indicated throughout the settlement agreement). As a result, the court did not err in granting Husband's motion to correct errors, vacating the QDRO signed by the court on January 12, 2011, and ordering Husband's counsel to submit a QDRO consistent with the terms of the Settlement Agreement.

For the foregoing reasons, we affirm the trial court's order granting Husband's motion to correct errors, vacating the previously-approved QDRO, and ordering a QDRO consistent with the Settlement Agreement.

Affirmed.

MAY, J., and CRONE, J., concur.