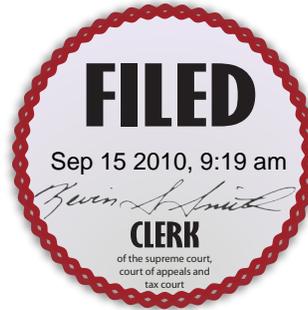


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ATTORNEY FOR APPELLANT/
CROSS-APPELLEE:

KENDRA G. GJERDINGEN
Mallor Clendening Grodner & Bohrer LLP
Bloomington, Indiana

ATTORNEY FOR APPELLEE/
CROSS-APPELLANT:

STEPHEN P. ROTHBERG
Fort Wayne, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MAURITS WIERSEMA,)
)
Appellant/Cross-Appellee/Respondent,)
)
vs.)
)
LISA (WIERSEMA) BAUMAN,)
)
Appellee/Cross-Appellant/Petitioner.)

No. 02A03-0912-CV-571

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
The Honorable Lori K. Morgan, Magistrate
Cause No. 02D07-0707-DR-811

September 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Both Appellant/Cross-Appellee/Respondent Dr. Maurits Wiersema and Appellee/Cross-Appellant/Petitioner Dr. Lisa Bauman appeal from the trial court's disposition of certain assets following the dissolution of their marriage. Wiersema contends that the trial court abused its discretion in valuing his interest in Indiana Medical Associates Gastrointestinal, LLC ("IMAGI") and including 2007 state and federal tax refunds and unvested portions of a 401(k) account in the marital estate. Wiersema also contends that the trial court abused its discretion in failing to credit him for property taxes he paid after the dissolution filing on real estate owned by the couple. For her part, Bauman contends that the trial court abused its discretion in assigning her half of a golf club membership, assigning the value of an investment to her that she claims is worthless, and ordering allegedly excessive guardian ad litem ("GAL") fees.

Wiersema and Bauman were married in 1986 and finally separated in 2007, when Bauman petitioned for dissolution. Over the years, the couple had amassed a marital estate worth approximately six million dollars. At various times during the marriage, Bauman had written a check for \$50,000.00 to her brother for an investment, Wiersema had begun working for a medical practice and started a 401(k) account, Wiersema had obtained a 9.41% interest in IMAGI, and the couple joined a golf club in Bauman's name, paying a \$15,000.00 initiation fee. Following Bauman's dissolution petition, the couple filed joint tax returns for the year in which the petition was filed, generating refunds, and agreed on the appointment of a GAL for their two children. Also, Wiersema paid property taxes on two properties owned by the couple out of post-filing income. Over a year after filing, IMAGI was purchased by Lutheran Health Network Investors,

LLC (“Lutheran”), and Wiersema received 107 shares in Lutheran in exchange for his IMAGI interest.

In its final order, among the assets the trial court included in the marital estate and assigned to Bauman were half of the golf club membership and the right to collect on the loan to her brother. Among the assets the trial court included in the marital estate were the entirety of Wiersema’s Indiana Medical Associates (“IMA”) 401(k) and the 2007 federal and state tax refunds. The trial court assigned to Wiersema the 107 Lutheran shares generated by the IMAGI sale and valued them at \$1,000,000.00. The trial court’s order did not address the post-filing property taxes paid by Wiersema. Finally, the trial court ordered that the parties would share the \$16,521.00 GAL fee equally.

In Indiana, the disposition of assets following a marriage dissolution is left to the discretion of the trial court and is only disturbed on appeal for an abuse of that discretion. We conclude that the trial court’s valuation of Wiersema’s Lutheran shares is supported by the record, despite Wiersema’s argument that they are worth a great deal less. We also conclude that the trial court correctly included the 2007 tax refunds in the marital estate, as Wiersema should have to accept the burdens of joint filing as well as the benefits. The trial court, however, abused its discretion in including unvested portions of Wiersema’s 401(k) in the marital estate, as he had no present right to those funds and there is no indication that they were accrued through joint effort of the parties. The trial court also should have addressed the post-filing property taxes paid by Wiersema and assigned half of the liability to Bauman, as the debt was accrued prior to final separation. The trial court properly assigned half of the golf club membership, because there was no

evidence conclusively showing that only Wiersema would benefit from such a split while Bauman would be assigned a worthless asset. The trial court also properly assigned the right to collect the loan from Bauman's brother to her, as it could have concluded that there is a likelihood that it be repaid and because there is evidence that the debt is secured in any event. Finally, we conclude that Bauman has failed to establish that the trial court abused its discretion in assessing and dividing responsibility for GAL fees, as she points to no evidence of such abuse. Accordingly, we affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Wiersema and Bauman were married on May 17, 1986. Wiersema and Bauman had two children during their marriage, Ma.W., born October 23, 1991, and Mi.W., born September 8, 1993. On November 13, 2003, Bauman wrote her brother a check for \$50,000.00, ostensibly to invest in a "'Dish Network' calling campaign[,]" which was originally to be repaid by March 1, 2004, and from which Bauman and Wiersema were to receive some of her brother's net proceeds ("The Bauman Investment"). Petitioner's Ex. 60. From April 1, 2004, to August 30, 2006, Bauman's brother made payments on the loan totaling \$7175.00, and the balance due as of February 2, 2009, was \$55,997.80.

Wiersema began working for IMA in March of 2005, and participated in a 401(k) to which both he and IMA contributed. The plan provided that Wiersema would always be 100 percent vested with respect to his contributions and would vest in matching contributions according to a schedule. Specifically, the plan provided that Wiersema would begin vesting in matching contributions at the rate of twenty percent per year

beginning after his second year of vesting service. As of January 31, 2007, Wiersema's contributions to the 401(k) totaled \$26,786.99 and IMA's \$19,502.49. On July 27, 2007, Bauman filed for dissolution of the marriage. Consequently, Wiersema was twenty percent vested in IMA's contribution to his 401(k) on the filing date. On August 15, 2007, Bauman and Wiersema filed a stipulation for the appointment of a GAL for Ma.W. and Mi.W.

In 2008, Wiersema and Bauman filed joint federal and state tax returns for 2007. (Pet. Ex. 33). Subsequently, a 2007 federal refund of \$38,237.00 and a 2007 state refund of \$4344.00 were deposited into Wiersema's account. Also after Bauman's filing, Wiersema paid property tax from his post-filing income on the couple's properties on Lake Wawasee and in Chicago in the amounts of \$547.66 and \$4817.00, respectively.

The trial court held hearings on the matter on February 9, March 9, March 10, and March 13, 2009. Both Wiersema and Bauman presented expert testimony regarding the value of Wiersema's 9.41% interest in IMAGI. Thomas Sponsel, Bauman's expert, testified that his initial estimate of the value of Wiersema's IMAGI holdings on July 27, 2007, was \$495,000.00. Following this initial estimate, however, agreement was reached for the purchase of IMAGI by Lutheran Health Network Investors, LLC ("Lutheran"), on December 1, 2008. The final sale price for IMAGI was \$12,500,000.00, and Wiersema received 107 shares of Lutheran and approximately \$2500.00 in cash in exchange for his interest. Sponsel testified that IMAGI as it existed at the time of the sale was essentially the same entity that existed at the time Bauman filed for dissolution. Based on what Wiersema received from the actual sale of IMAGI, and adjusting for the relative lack of

marketability of his Lutheran shares, Sponsel finally estimated that the value of Wiersema's interest at the time of separation was, in fact, approximately \$1,000,000.00.

During their marriage, Wiersema and Bauman had had a membership at Sycamore Hills Golf Club. At the hearing, Sycamore Hills General Manager Donald Hunter testified that a \$15,000.00 initiation fee had been paid for the membership, which was in Bauman's name, and that the membership could stay in Bauman's name, be transferred to Wiersema, or split, with each receiving credit for half of the initiation fee. The practical effect of a split would be that if either party then wanted to retain an individual membership, he or she would have to pay \$7500.00 to satisfy the initiation fee requirement. Bauman testified that she would be willing to transfer the membership to Wiersema for value if he wanted to remain a Sycamore Hills member. Wiersema testified that he wanted the membership to either remain in Bauman's name or to be split, "allow[ing] us each to choose whether or not we desire to continue to be members there[.]" Mar. 13, 2009, Tr. p. 150.

On July 29, 2009, the trial court entered its order dissolving Bauman's and Wiersema's marriage. On August 19, 2009, the trial court entered a nunc pro tunc order restoring Bauman's maiden name. Bauman and Wiersema both filed motions to correct error. The trial court granted Wiersema's motion to correct error in whole and Bauman's in part, issuing an amended dissolution order on November 17, 2009.

The dissolution order provided for an equal distribution of marital assets. Among the assets the trial court included in the marital estate and assigned to Bauman were half of the Sycamore Hills membership (value \$7500.00) and the right to collect on the

Bauman Investment (value \$55,997.80). Among the assets the trial court included in the marital estate were the entirety of Wiersema's IMA 401(k) (value \$41,319.00) and the 2007 federal and state tax refunds (value \$42,581.00). The trial court valued the 107 Lutheran shares generated by the IMAGI sale (\$1,000,000.00) and assigned them to Wiersema. The trial court's order did not address the post-filing property taxes paid by Wiersema. Finally, the trial court ordered that the parties would share the \$16,521.00 GAL fee equally.

DISCUSSION AND DECISION

Standard of Review

Where, as here, the trial court *sua sponte* enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Id.* We neither reweigh the evidence nor assess the witnesses' credibility, and consider only the evidence most favorable to the judgment. *Id.* Further, "findings made *sua sponte* control only ... the issues they cover and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id.*

"Subject to the statutory presumption that an equal distribution of marital property is just and reasonable, the disposition of marital assets is committed to the sound

discretion of the trial court.” *Augspurger v. Hudson*, 802 N.E.2d 503, 512 (Ind. Ct. App. 2004).

An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances, or the reasonable, probable, and actual deductions to be drawn therefrom. An abuse of discretion also occurs when the trial court misinterprets the law or disregards evidence of factors listed in the controlling statute. The presumption that a dissolution court correctly followed the law and made all the proper considerations in crafting its property distribution is one of the strongest presumptions applicable to our consideration on appeal. Thus, we will reverse a property distribution only if there is no rational basis for the award and, although the circumstances may have justified a different property distribution, we may not substitute our judgment for that of the dissolution court.

Id. (citations, quotation marks, and brackets omitted).

I. Whether the Trial Court Abused its Discretion in Valuing Wiersema’s Interest in IMAGI at the Time of Final Separation

Indiana Code section 31-15-7-4 (2007) provides that the marital estate that the trial court must divide in a dissolution proceeding is comprised of the property owned or acquired by either party before the “final separation of the parties[,]” which is defined as “the date of filing of the petition for dissolution of marriage[.]” Ind. Code § 31-9-2-46 (2007). In other words, the marital estate is set at the time of the filing of the dissolution petition, which, in this case, was on July 27, 2007, over one year prior to Lutheran’s purchase of IMAGI.

Wiersema argues that the trial court, by including Wiersema’s 107 shares in Lutheran in the marital estate, included an asset that he did not possess on the date of final separation. Wiersema also argues that the trial court’s valuation of his Lutheran shares at \$1,000,000.00 is not an accurate reflection of IMAGI’s value on the date of

final separation, as IMAGI allegedly changed between the date of final separation and its sale to Lutheran. Although Wiersema is correct that he did not own any Lutheran shares on the date of final separation, he received them in exchange for his interest in IMAGI, which was unquestionably part of the marital estate. We agree with those authorities that have held that an asset received in exchange for a marital asset is itself a marital asset. *See, e.g., Brackney v. Brackney*, 682 S.E.2d 401, 406 (N.C. Ct. App. 2009) (“[P]roperty acquired in exchange for marital funds is considered marital property to the extent of the contribution even after separation.”). As Bauman notes, to conclude otherwise would allow, and perhaps even encourage, a party to dissipate marital assets simply by selling or exchanging them.

As for the trial court’s valuation of the Lutheran shares, we cannot say that Wiersema has established that it abused its discretion. Keeping in mind that we may only consider evidence favorable to the judgment, the trial court’s conclusion that Wiersema’s interest in IMAGI was worth \$1,000,000.00 is supported by the record. There is no dispute that IMAGI, of which Wiersema owned 9.41%, was bought by Lutheran for 12.5 million dollars.¹ Moreover, Sponsel testified that IMAGI as it existed on the date of the sale was essentially the same entity that existed on the date of the final separation. Although Wiersema draws our attention to evidence that IMAGI increased in value between his final separation from Bauman and its sale, his argument amounts to nothing more than an invitation to reweigh the evidence, which we will not do.

II. Whether the Trial Court Abused its Discretion in Including 2007

¹ 9.41% of 12.5 million dollars is approximately 1.13 million dollars.

Federal and State Tax Refunds in the Marital Estate

Wiersema contends that the trial court abused its discretion in including 2007 tax refunds received by him in the marital estate, contending that uncontroverted evidence establishes that they were funded by his post-filing income. “It is true that property acquired after final separation is generally not subject to division as a marital asset.” *Nill v. Nill*, 584 N.E.2d 602, 605 (Ind. Ct. App. 1992), *trans. denied*. The disposition of tax refunds when the couple has filed jointly, however, has been held to be an exception to this general rule in Indiana, at least in some cases.

This is one of those cases. In *Nill*, we concluded that a tax refund from the year in which the dissolution petition was filed was properly included in the marital estate, even though husband was the sole wage earner and the petition was filed on April 21 of that year. *Id.* at 603-06. Among the considerations we cited were that persons who file jointly were no doubt swayed by the pecuniary advantage of doing so. *Id.* at 605. Had Wiersema and Bauman not filed jointly, the refunds at issue would not have been as large, and Wiersema now seeks to enjoy the benefits of filing jointly without shouldering the burdens. *Id.* Moreover, to the extent that the tax refunds represent money that was overpaid during the marriage, Bauman was denied the opportunity to enjoy those funds. *See Moore v. Moore*, 695 N.E.2d 1004, 1010 (Ind. Ct. App. 1998). Because Wiersema fails to point to any other circumstance, such as an agreement that he and Bauman keep their property and earnings completely separate, that might justify treating the tax refunds as his alone, he has failed to establish that the trial court abused its discretion in this regard.

III. Whether the Trial Court Abused its Discretion in Including Unvested Portions of a 401(K) Account in the Marital Estate

While “[i]t has long been the law in this State that future earnings are not considered part of the marital estate for purposes of property division[,]” *Beckley v. Beckley*, 822 N.E.2d 158, 160 (Ind. 2005), a right to receive future payments can be considered property. Some of these instances are governed by statute. Indiana Code section 31-9-2-98 (2007) provides, in relevant part, that

‘[p]roperty’ ... means all the assets of either party or both parties, including ... 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[.]

As we have noted, “Indiana’s ‘one pot’ theory prohibits the exclusion of any asset in which a party has a vested interest from the scope of the trial court’s power to divide and award.” *Hann v. Hann*, 655 N.E.2d 566, 569 (Ind. Ct. App. 1995), *trans. denied*.

Wiersema contends that the trial court abused its discretion by including the portion of his 401(k) in the marital estate that was unvested on the date of the final separation, namely eighty percent of IMA’s contribution, approximately \$15,600. “A baseline principle of Indiana family law is that ‘[o]nly property with a vested interest at the time of dissolution may be divided as a marital asset.’” *Vadas v. Vadas*, 762 N.E.2d 1234, 1235 (Ind. 2002) (quoting *Mullins v. Matlock*, 638 N.E.2d 854, 856 (Ind. Ct. App. 1994)). “*Black’s Law Dictionary* 1557 (7th ed. 1999) defines a vested interest as one ‘[t]hat has become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute.’” *Id.*

Although this basic rule has been clearly held to apply to unvested portions of 401(k) plans, *see id.* (citing *Harris v. Harris*, 690 N.E.2d 742 (Ind. Ct. App. 1998)), Bauman contends that the plan here is governed by the Indiana Supreme Court's decision in *In re the Marriage of Adams*, 535 N.E.2d 124 (Ind. 1989), in which the Court concluded that a police pension's proceeds that the husband had no right to collect until three months after the final separation were nonetheless part of the marital estate. *Id.* at 127. The *Adams* court concluded that the pension benefits would be included in the marital estate, in part, because it "[f]ound] the evidence sufficient to support the conclusion that the husband's police pension rights were acquired by the joint efforts of the parties and therefore not subject to the 'prior to final separation' limitation." *Id.* Here, at the very least, there is no indication in the record, and Bauman does not claim, that Wiersema's rights in his 401(k) were in any way the result of a joint effort. So, even to the extent that *Adams* might be applicable to a 401(k), its holding is not triggered here due to a lack of evidence of joint effort. We must therefore conclude that the trial court abused its discretion in including in the marital estate any of the unvested portion of Wiersema's IMA 401(k).

IV. Whether the Trial Court Abused its Discretion in Failing to Credit Wiersema with Certain Post-Filing Property Tax Payments

As previously mentioned, Wiersema paid property tax from his post-filing income on the couple's properties on Lake Wawasee and in Chicago in the amounts of \$547.66 and \$4817.00, respectively. These payments were not addressed in the trial court's dissolution order, and Wiersema contends that the trial court abused its discretion in

failing to give him credit for half of the payments. We agree with Wiersema. The record indicates that the taxes accrued before Wiersema and Bauman's final separation, making it immaterial that Wiersema was awarded the Chicago property in the dissolution order. The marital estate includes not only assets accrued before the final separation; it must include the debts as well. *See Keown v. Keown*, 883 N.E.2d 865, 871 (Ind. Ct. App. 2008) ("The marital estate includes assets and liabilities.").

**V. Whether the Trial Court Abused its Discretion in Assigning
Half of the Sycamore Hills Membership to Bauman^[2]**

Bauman contends that the trial court abused its discretion in assigning half of the Sycamore Hills membership to her when she has no desire to join the club, rendering the asset basically worthless to her. Bauman's argument is premised on her contention that the evidence establishes that Wiersema planned to remain a member in any event. If true, we would be inclined to agree with Bauman that assigning half of the membership to her makes little sense: If Wiersema retains his membership, he is out an additional \$7500 either way, but Bauman is not forced to essentially purchase a worthless asset for \$7500 if the entire membership is assigned to Wiersema. The record, however, does not establish that Wiersema definitely intends to remain a member at Sycamore Hills, and he does not concede that he does. Indeed, Wiersema testified that he wished the membership to be divided so that each of them could decide if he or she wanted to remain

² We note that Bauman argued in the alternative that the unvested portion of Wiersema's 401(k), valued at approximately \$15,600, was *de minimus*, an amount too small to deserve this court's attention. Bauman, though, makes no attempt to explain how her half of the Sycamore Hills membership, at less than half that value, is not *de minimus*. In any event, we are not prepared to characterize assets worth several thousand dollars as *de minimus* and so will address all claims on the merits.

members, from which one may infer that he had not yet decided. If Wiersema does not retain his membership in Sycamore Hills, his half of the membership will be just as worthless to him as Bauman's half is to her. In light of this, the trial court did not abuse its discretion in assigning half of the membership to each.

VI. Whether the Trial Court Abused its Discretion in Assigning the Bauman Investment to Bauman

Bauman contends that the trial court abused its discretion in assigning the Bauman Investment to her, arguing that there is no evidence that it would ever be repaid, rendering it a worthless asset. Wiersema, however, testified that the investment was a loan that was to be paid back over "several years" as Bauman's brother's "financial footing became more secure and that he would provide interest payments on the balance." Mar. 13, 2009, Tr. p. 145. Moreover, Bauman's brother has, at least, made some payments on the loan, from which one may infer an intent to repay it when he is able. Finally, there is evidence in the record that the Bauman Investment is not worthless, even if it is never paid back. Wiersema testified that Bauman was made beneficiary of her brother's retirement account as security for the loan, and there is no indication that this designation has changed. Bauman's challenge to Wiersema's credibility regarding the nature of the Bauman Investment is an invitation to reweigh the evidence, which we will not do. The trial court did not abuse its discretion in this regard.

VII. Whether the Trial Court Abused its Discretion in Calculating GAL Fees and in Ordering that Wiersema and Bauman Pay an Equal Share

Bauman contends that the GAL allegedly charged attorney rates for non-attorney work and that she should not have to pay as much as Wiersema because the GAL was

appointed due to his alleged misconduct. The appointment of a GAL is a matter entrusted to the sound discretion of the trial court, *Matter of Paternity of A.R.R.*, 634 N.E.2d 786, 790 (Ind. Ct. App. 1994), as is, generally, the GAL's payment. *In re Paternity of N.L.P.*, 926 N.E.2d 20, 23 (Ind. 2010). Bauman's argument, however, is unsupported by the record. Although Bauman suggests that the GAL overbilled by charging attorney rates for non-attorney work, she points to no evidence in the record that this was the case. Moreover, Bauman points to no evidence in the record that the GAL's appointment was precipitated by Wiersema's abusive behavior. Bauman has failed to establish that the trial court abused its discretion in assessing GAL fees.

Conclusion

We conclude that the trial court did not abuse its discretion in valuing Wiersema's IMAGI holdings at the time of final separation at \$1,000,000.00, including 2007 tax refunds in the marital estate, assigning half of the Sycamore Hills membership to Bauman, assigning the Bauman Investment to Bauman, and assessing GAL fees. We conclude, however, that the trial court abused its discretion in including unvested portions of Wiersema's IMA 401(k) in the marital estate and in failing to assign liability for half of certain property taxes paid post-filing by Wiersema to Bauman. We remand for instructions to revise the final dissolution order so as not to include the unvested portions of Wiersema's 401(k) in the marital estate, assign half of the property tax liability to Bauman, and recalculate the distribution of the marital estate as appropriate.

We affirm in part, reverse in part, and remand with instructions.

DARDEN, J., and BROWN, J., concur.