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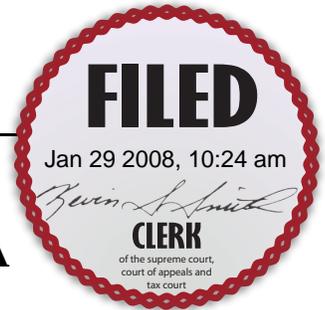
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**IN THE
COURT OF APPEALS OF INDIANA**



IN RE THE MARRIAGE OF:)

SANDRA J. BYRD,)

Appellant-Petitioner,)

and)

CHARLES D. PIERCE,)

Appellee-Respondent.)

No. 48A02-0703-CV-257

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0305-DR-452

January 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The marriage of Appellant-Petitioner Sandra Byrd (“Sandra”) and Appellee-Respondent Charles Pierce (“Charles”) was dissolved on October 20, 2006. Sandra appeals, and Charles cross-appeals, challenging the division of marital property. We affirm.

Issues

Sandra and Charles each present three issues for our review, which we consolidate and restate as the following four issues:

- I. Whether the trial court erred in the admission of evidence;
- II. Whether the division of the marital estate is clearly erroneous because the trial court failed to comply with applicable statutes;
- III. Whether the trial court abused its discretion in selecting a pension valuation date and assigning a value unsupported by the evidence; and
- IV. Whether the trial court abused its discretion by ignoring tax consequences.

Facts and Procedural History

Charles and Sandra were married on September 12, 1998. It was the fourth marriage for each. On May 22, 2003, Sandra petitioned to dissolve the marriage.

The trial court conducted a final hearing on September 7, 2006. On October 20, 2006, the trial court issued its findings of fact, conclusions of law, and order dissolving the marriage and dividing the marital estate, valued at \$1,334,869.00. After credit for provisional payments, Charles was ordered to pay Sandra \$123,222.00.

Each party filed a motion to correct error. On December 18, 2006, the trial court conducted a hearing upon the motions. With the signed consent of both parties, the trial

court delayed the decision upon the respective motions to correct error until February 7, 2007. On that date, the trial court entered extensive findings of fact and conclusions of law, and apportioned to Sandra \$191,081.00 in marital assets. Taking into account prejudgment credits, the trial court ordered Charles to pay Sandra \$149,463.00. Sandra now appeals, and Charles cross-appeals.

Discussion and Decision

I. Admissibility of Evidence

Sandra complains that the trial court erroneously relied upon Charles' Exhibits A and D, because neither was formally admitted into evidence. She also contends that the trial court erroneously refused to consider an affidavit proffered at the motion to correct error hearing, in which Sandra's disability attorney averred that she had been awarded Social Security disability benefits.

Indiana Trial Rule 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

It appears that Respondent's Exhibits A and D were not formally admitted into evidence despite the fact that these exhibits were the main focus of expert testimony during the final hearing and the hearing on motion to correct error. Certified Public Accountant John Sandlin ("Sandlin") compiled these exhibits at Charles' request, and made certain modifications at

Sandra's request. Ultimately, the trial court was presented with four alternative valuations of the marital estate. Sandlin described the document entries in great detail during his direct and cross-examination testimony. Sandra did not claim that the exhibits failed to include assets of the parties or misstated the values of real or personal property; nor did she proffer contradictory exhibits. Rather, the controversy between the parties centered upon a choice of valuation dates, the selection of pension valuation methodology, and what percentage of the marital assets Sandra should receive. Accordingly, the reliance upon Respondent's Exhibits A and D to determine the existence of marital assets, despite the lack of formal admission, was not error "inconsistent with substantial justice" as contemplated by Trial Rule 61.

Sandra further contends that evidence of the award of disability benefits would have effectively undermined Charles' testimony that she had twice been denied Social Security benefits and the implication that she was not truly disabled. Although the eventual award of disability benefits did not show Charles' earlier testimony to be false, it is clearly relevant evidence of Sandra's earning capabilities. Nevertheless, we are not persuaded that the trial court committed reversible error when it refused the affidavit of Sandra's disability attorney as there was other evidence that Sandra anticipated no future employment.

Sandra had initially requested an award of permanent maintenance due to depression and post-traumatic stress disorder. The parties agreed that a psychiatrist of Sandra's choosing would examine and test her, and the maintenance claim would be dependent upon the expert opinion. Once Dr. Hale offered the opinion that Sandra was employable, she withdrew her maintenance claim as agreed. Her employability remained directly relevant only as to the respective economic circumstances of the parties as considered by the trial

court in a division of the marital estate. See Ind. Code § 31-15-7-5. Uncontroverted testimony had established that Sandra was unemployed, had been unemployed for several years, did not plan to return to work as a registered nurse, and was challenging the past denial of Social Security disability benefits. As such, the trial court was aware that Sandra's economic circumstances at the time of property division were very disparate from those of Charles, a General Motors employee of thirty-plus years. The exclusion of the affidavit was not so prejudicial to Sandra as to deny her substantial justice.

II. Property Division

A. Standard of Review – Property Division

The distribution of marital property is committed to the sound discretion of the trial court. Breeden v. Breeden, 678 N.E.2d 423, 427 (Ind. Ct. App. 1997). However, Indiana Code Section 31-15-7-5 creates a rebuttable presumption that an equal division of the marital property of the parties is just and reasonable. Akers v. Akers, 729 N.E.2d 1029, 1033 (Ind. Ct. App. 2000). A party who challenges the trial court's division of marital property must overcome a strong presumption that the court considered and complied with the applicable statute. In re Marriage of Bartley, 712 N.E.2d 537, 542 (Ind. Ct. App. 1999). Even if the facts and reasonable inferences might allow a conclusion different from that reached by the trial court, we will not substitute our judgment for that of the trial court unless its decision is clearly against the logic and effect of the facts and circumstances before it. Perkins v. Harding, 836 N.E.2d 295, 299 (Ind. Ct. App. 2005).

When, as here, the trial court finds the facts specially and states its conclusions thereon pursuant to Indiana Trial Rule 52, the court on appeal shall not set aside the findings

or judgment unless clearly erroneous. State Farm Mut. Auto Ins. Co. v. Leybman, 777 N.E.2d 763, 765 (Ind. Ct. App. 2002), trans. denied. We review the judgment by determining, first, whether the evidence supports the findings and, second, whether the findings support the judgment. Evans v. Med. and Prof'l Collection Servs, Inc., 741 N.E.2d 795, 797 (Ind. Ct. App. 2001). We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we neither reweigh the evidence nor assess witness credibility. Id. However, appellate courts owe no deference to trial court determinations deemed questions of law. GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001).

B. Analysis

At the final hearing, evidence was adduced that the marital estate was worth over one million dollars. Prior to the marriage, Charles had acquired several rental properties and had made certain investments. At the same time, Sandra possessed some personal property including a truck that was later given to her son. Charles proposed that the property division order should set aside to him the value of his pre-marital assets, but equally divide the appreciation thereon during the marriage. In dividing the marital estate, the trial court set aside to Charles the value of his pre-marital assets and divided the appreciation equally. On motion to correct error, Sandra was awarded a larger share.

Sandra now argues that the trial court's award of approximately 87% of the marital estate to Charles must be reversed because (1) previously acquired property was systematically excised from the marital estate and (2) the trial court failed to consider the substantial disparity in the parties' respective earnings abilities.

Indiana Code Section 31-15-7-5 governs the distribution of marital property and provides as follows:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
 - (A) a final division of property; and
 - (B) a final determination of the property rights of the parties.

Accordingly, Indiana Code Section 31-15-7-5 requires the trial court to presume that an equal division of marital property is just and reasonable, absent relevant evidence to rebut the presumption. Capehart v. Capehart, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999), trans. denied.

The trial court must consider all of the statutory factors with none taking precedence over another. Chestnut v. Chestnut, 499 N.E.2d 783, 786 (Ind. Ct. App. 1986). There exists a very strong presumption that the trial court considered all the evidence of record and applied the statutory factors. Id.

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. Accordingly, the systematic exclusion of any marital asset from the marital pot is erroneous, including those attributable to a gift or an inheritance from one spouse's parents. Wallace v. Wallace, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999), trans. denied. However, although the trial court must include all assets in the marital pot, it may ultimately decide to award an asset solely to one spouse as part of its just and reasonable property division. Coffey v. Coffey, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995); see also Indiana Code § 31-15-7-5(1)(B) (providing that the trial court may consider as evidence to rebut the presumptive equal distribution "the extent to which the property was acquired by each spouse through inheritance or gift"). Nevertheless, even where the trial court properly sets aside the value of an original gift to one spouse, the appreciation of the gift is a divisible marital asset. Cooper v. Cooper, 730 N.E.2d 212, 217 (Ind. Ct. App. 2000).

Here, the trial court included in the marital pot those assets owned by Charles prior to the marriage, but decided to award those assets to Charles because Sandra did not contribute to their acquisition and the marriage was a short-term one. The appreciation only was divided between the parties. In its initial decision, the trial court explained the deviation from the presumptive 50/50 split as follows:

Since practically all of the Parties assets were acquired by Husband without any contribution from Wife prior to the Parties' short term marriage, the Court does not believe an equal division of all marital property owned by both Parties is just and reasonable.

(App. 18.) In the order upon motions to correct error, the trial court further clarified that all assets were included in the marital pot:

Despite Charles' efforts to in effect exclude property from the marital estate even in the absence of a prenuptial agreement, "Indiana subscribed to the 'one-pot' theory of marital possessions," according to which "all the property, 'whether owned by either spouse prior to marriage, acquired by either spouse in his or her right after the marriage and prior to final separation of the parties, or acquired by their joint efforts,'" Perkins v. Harding, 836 N.E.2d 295, 299 (Ind. Ct. App. 2005) constitutes the marital estate. . . . Under these principles, the Court finds and concludes that the assets listed in Lines 1-69 of Respondent's Exhibit D – the assets themselves, and not necessarily the values that Charles assigned to them – are the assets that belong in the marital pot.

(App. 29.) It is clear that the trial court did not systematically excise premarital assets from the marital estate. Rather, after due consideration, the trial court set aside to Charles certain assets acquired before the marriage.

Moreover, it is clear that the trial court did not ignore the disparate earning capabilities of the parties. As stated by the trial court,

After reviewing this record in detail, the Court resolves this choice [of valuation date] by finding and concluding that the parties' post-filing cohabitation, along with Sandra's several significant economic and non-economic contributions to the marriage, justify awarding her a larger portion of the marital estate than she received under the Findings of Fact and Conclusions of Law issued October 20, 2006. . . . The overall result is especially sound because Charles still receives almost 87% of the marital estate under this Order, and because of the great imbalance in the economic circumstances and earning potential of the parties, two areas in which Charles will continue to enjoy distinct advantages over Sandra even with this Order's modifications of the original property order.

(App. 28-29.) The trial court ultimately decided to award Sandra more than one-half of the asset appreciation because Charles was in the superior economic position. The trial court did

not disregard relevant statutory authority to effect a property division amounting to an abuse of discretion.

III. Valuation of Pension

Charles first claims that the trial court abused its discretion by selecting a pension valuation date of December 16, 2004, which took into account the parties' cohabitation after the petition for dissolution was filed.

The value of a pension for the purpose of dividing the marital estate only includes the pension benefits acquired prior to the final separation date. Thompson v. Thompson, 811 N.E.2d 888, 916 (Ind. Ct. App. 2004), trans. denied. Charles contends that the date Sandra filed the petition for dissolution and the final separation date should be the same. He argues "the fact that [he and Sandra] resided in the same house during that period [from May 2003 date of filing to December 2004] does not mean that they were cohabitating for purposes of application of the coverture fraction rule." Appellee's Brief at 17. Charles further claims "there was no evidence that the parties were living together as husband and wife as opposed to simply a matter of convenience and economic necessity." Appellee's Brief at 18.

However, the record is contrary to these contentions. Sandra testified that, despite the filing of a petition for dissolution, she lived in the marital residence until September of 2005, performed routine household tasks, and cared for Charles after he underwent surgery. She further testified that she felt she was "still in [the] marriage." (Tr. 141.) Charles testified that he felt "we should give it another try." (Tr. 211.) As the parties continued to live together for a significant period of time after the petition for dissolution was filed, the trial court did not abuse its discretion by selecting a post-filing date for pension valuation.

Charles also alleges that the trial court's valuation was based on speculation that the pension increased in value at a uniform rate and failed to take into account a decrease in value of the early retirement supplement caused by Charles' continued employment. Those who have accumulated property to be divided are in a better position than are the courts to determine the extent and value of their assets. See Perkins, 836 N.E.2d at 301. The value assigned to the pension, specifically \$365,265, was within the range of values suggested by Charles in the exhibits compiled for the trial court's consideration. We find no abuse of discretion by the trial court in valuing the pension.

IV. Tax Consequences

Finally, Charles claims that the value of certain assets was "artificially enhanced" because the trial court failed to decrease the value of his rental property by taking into account real estate taxes accrued but not yet paid and also failed to account for his payment of income taxes on pension distributions when he receives those funds in the future. Appellee's Brief at 25.

The trial court explained that Charles' claimed deduction for accrued real estate taxes was disallowed because the income derived from the rental property was treated as Charles' income rather than a marital asset. The reasoning of the trial court is sound. As the rental income was not distributed between the parties, the expenses of generating that rental income was properly not allocated between the parties.

Finally, we address the trial court's decision not to apply an after-tax value to the pension plan. Tax consequences are governed by Indiana Code Section 31-15-7-7, which provides, "The court, in determining what is just and reasonable in dividing property under

this chapter, shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party.”

The statute requires the trial court to take into account only the direct or inherent and necessarily incurred tax consequences of the property disposition. Harlan v. Harlan, 560 N.E.2d 1246 (Ind. 1990) (adopting the Court of Appeals decision at 544 N.E.2d 553, 555 (Ind. Ct. App. 1989)). Here, there are no such tax consequences. Charles was not ordered to liquidate his pension, or any portion thereof. The pension was one of many assets included in the marital estate. Charles was ordered to pay Sandra a money judgment, which might well be satisfied from other assets. If there were no other assets, and Charles necessarily had to liquidate a portion of his pension to satisfy the order for payment within sixty days, another result might ensue.¹

Here, the trial court’s order did not cause direct, inherent and necessarily incurred tax consequences. The trial court did not abuse its discretion by refusing to reduce the value of Charles’ pension.

Conclusion

The trial court’s decisions on the admission of evidence did not deny Sandra substantial justice. The evidence supports the findings and the findings support the judgment of the trial court. The trial court did not disregard relevant statutes, nor did the trial court

¹ A panel of this Court has, in dicta, recognized that “the application of after-tax values [to a marital pension] do not appear to fall squarely within the parameters set by Indiana Code Section 31-15-7-7, in that the taxes are not the direct or inherent and necessarily incurred consequences of the property distribution.” Hartley v. Hartley, 862 N.E.2d 274, 284 n.7 (Ind. Ct. App. 2007). However, the Hartley Court also recognized that our Indiana Supreme Court had not explicitly disagreed with In re Marriage of Mulvihill, 471 N.E.2d 10, 14 (Ind. Ct. App. 1984), wherein a panel of this Court concluded that the trial court did not abuse its discretion in allowing the tax deduction from the husband’s retirement plan, noting that unless the husband

abuse its discretion in the valuation or distribution of assets. Finally, the trial court did not abuse its discretion by disregarding claimed tax consequences.

Affirmed.

NAJAM, J., and CRONE, J., concur.

died before retirement or disability, the tax consequences were definite and not speculative. Id.