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ATTORNEY FOR APPELLANT:

STEPHEN R. HARDACRE
Hulse, Lacey, Hardacre, Austin & Shine, P.C.
Anderson, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS A. JACKSON,)
)
Appellant-Respondent,)
)
vs.) No. 48A02-0703-CV-256
)
MARTINA K. JACKSON,)
)
Appellee-Petitioner.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable James O. Anderson, Jr., Special Judge
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0605-DR-445

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Dennis A. Jackson (“Husband”) appeals the trial court’s denial of his motion to correct error regarding the division of marital property following the dissolution of his marriage to Martina K. Jackson (“Wife”). Specifically, Husband argues that the trial court erred in ordering him to make immediate monthly payments to Wife for her share of the value of his early retirement benefit even though he was not retired because the court felt constrained to do so by case law. Concluding that the trial court neither misinterpreted the law nor abused its discretion in dividing Husband’s early retirement benefit in this manner, we affirm the trial court.

Facts and Procedural History

Husband and Wife married in June 1997. At the time, Husband worked at General Motors (“GM”), and Wife worked at Wal-Mart. In 2000, Wife applied for and was awarded Social Security disability benefits in the amount of \$812.00 per month. Husband continued to work at GM.

In April 2006, the parties separated. Wife filed a Petition for Dissolution of Marriage in May 2006. No children were born to the marriage. At the time the dissolution petition was filed, Husband had worked at GM for 30.5 years. Husband and Wife were married for nine of those 30.5 years, or roughly 30% of the time. Although Husband, who was fifty years old at the time of the motion to correct error hearing in this case, was eligible for GM’s early retirement program, he chose to continue working because of his financial situation. In 2006, Husband’s pension at GM was valued as follows:

Early Retirement Benefit	\$318,738
Employee Retirement Benefit	111,616
Spousal Survivor Benefit	<u>11,299</u>
	\$441,653

Appellant's App. p. 16. Based on these figures, Husband early retirement benefit was \$2950 per month until he reached full retirement age of sixty-two years old, at which time the monthly benefit would decrease to \$1535.68. *Id.* at 17.

The final hearing on Wife's dissolution petition was held in September 2006. The trial court issued an order on November 10, 2006, dissolving the marriage and dividing the marital property. With respect to the division of Husband's pension at GM, the order provides, in pertinent part:

5. Respondent-Husband's GM pension (early retirement, employee retirement benefit and spousal survivor benefit shall be divided as follows: a) 30 percent divided equally between the Petitioner and Respondent, representing the period of coverture. b) 70 percent set over to Respondent-Husband.)

In the event Respondent-Husband elects not to retire until age 62, Respondent-Husband shall pay directly to Petitioner-Wife the sum of \$422 per month commencing December 1st, 2006 with like payments due on the same day of each month thereafter, until Respondent-Husband reaches the age of 62 years; thereafter, Respondent-Husband shall pay to Petitioner-Wife a reduced amount in the sum of \$230.35 per month. Should Respondent-Husband retire at any time after the date of this decree, then the monthly entitlement due Petitioner-Wife hereunder from Respondent-Husband's retirement benefits shall be payable to Petitioner-[W]ife by QDRO.

Id. at 5-6.

On December 8, 2006, Husband filed a Motion to Correct Errors alleging, in relevant part:

1. The trial court abused its discretion and committed error in dividing [Husband's] GM pension in a manner that is unfair and inequitable under the facts and circumstances presented in this case.
2. The trial court committed error in forcing [Husband] to purchase [Wife's] interest in [Husband's] GM Early Retirement Supplement at a time prior to [Husband's] effecting early retirement and under factual circumstances not warranting such a purchase.
3. The trial court committed error by dividing [Husband's] GM pension contrary to the methods of division recognized and authorized by Indiana statute and case law.
4. The trial court committed error by awarding [Wife] monetary sums, through purchase, which exceeded the amounts she would have received pursuant to qualified domestic relations order ("QDRO"), had [Husband] voluntary [sic] retired on date of separation.

Id. at 14-15. A hearing on this motion was held on January 16, 2007. Following the hearing, the trial court did not issue an order. Accordingly, the motion was deemed denied pursuant to Indiana Trial Rule 53.3. Husband now appeals.

Discussion and Decision

At the outset, we note that Wife did not submit an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish *prima facie* error. *State Farm Ins. v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). *Prima facie* is defined in this context as "at first sight, on first appearance, or on the face of it." *Id.* The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this Court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *Id.* Where an appellant is unable to meet that burden, we will affirm. *Id.*

On appeal, Husband contends that the trial court erred by ordering him “to make immediate monthly payments to [W]ife for her share of the value of [his] monthly early retirement benefit even though he was not retired.” Appellant’s Br. p. 2. Specifically, Husband argues that the trial court felt compelled by *Hughes v. Hughes*, 601 N.E.2d 381 (Ind. Ct. App. 1992), *trans. denied*, to divide his pension in this manner and therefore misinterpreted the law.

The disposition of marital assets is an exercise of the trial court’s sound discretion. *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005), *trans. denied*. We review for an abuse of discretion a claim that the trial court improperly divided marital property. *Id.* In doing so, we consider the evidence most favorable to the trial court’s disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id.* An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or has disregarded evidence of factors listed in the controlling statute. *Id.* Although a different conclusion might be reached in light of the facts and circumstances, we will not substitute our judgment for that of the trial court. *Id.*

It is undisputed that Husband’s early retirement benefit at GM is marital property subject to division. *See Harvey v. Harvey*, 695 N.E.2d 162, 166 (Ind. Ct. App. 1998); *Hughes*, 601 N.E.2d at 384. The issue, however, is whether the trial court abused its discretion in the manner in which it divided Husband’s early retirement benefit. Indiana Code § 31-15-7-4, which governs division of marital property, provides, in pertinent part:

- (b) The court shall divide the property in a just and reasonable manner by:
 - (1) division of the property in kind;

- (2) setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an amount, either in gross or in installments, that is just and proper;
- (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale; or
- (4) ordering the distribution of benefits described in IC 31-9-2-98(b)(2) or IC 31-9-2-98(b)(3) that are payable after the dissolution of marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

Ind. Code § 31-15-7-4(b). It appears that in dividing early retirement benefits, trial courts have followed both (b)(2) and (b)(4). As for Indiana Code § 31-15-7-4(b)(2),¹ in *Hughes*, the husband and the wife were married for thirty years and had one child together. The wife did not consistently work during the parties' marriage because of familial obligations. During the dissolution proceedings, the trial court considered the husband's early retirement benefit at GM as marital property subject to division even though the husband had not yet retired. It then awarded the asset to the husband but ordered him to make installment payments to the wife to satisfy her interest in the asset. On appeal, this Court noted that the trial court's order did not force the husband to retire but rather recognized that the asset was acquired by the joint efforts of both parties and could not be subject to distribution by the whim of the employed spouse. *Hughes*, 601 N.E.2d at 384. Accordingly, we affirmed the trial court's division of this asset. *Id.*

As for Indiana Code § 31-15-7-4(b)(4), in *Harvey*, this Court, following *Hughes*, held that the husband's early retirement benefit was marital property subject to division. *Harvey*, 695 N.E.2d at 166. However, the case was remanded to the trial court because of error in the trial court's division of the marital property. Because the trial court had

¹ In 1997, after *Hughes* was decided, Indiana Code § 31-1-11.5-11 was recodified at Indiana Code § 31-15-7-4.

initially preserved the wife's interest in the husband's early retirement benefit by a Qualified Domestic Relations Order ("QDRO"), we stated that if the trial court wished to utilize a QDRO on remand, "it should set aside a percentage of the pension not a specific sum." *Id.* at 166 n.5.

At the motion to correct error hearing in this case—during which Husband strenuously argued that the trial court's division of his early retirement benefit as in *Hughes* was unfair under the facts of this case and that the court should instead follow *Harvey* and utilize a QDRO—the trial court indicated that in reaching its initial decision, it "felt like the law, that the law in Indiana was what the *Hughes* case had, had held. And that I am going to go back, I'm going to reread it again. And I'll read all the Memorandum again, take the arguments here under advisement and" "look at *Harvey* also." Motion to Correct Error Hr. Tr. p. 49.

Despite Husband's argument on appeal that the trial court misinterpreted the law because it felt constrained by *Hughes* to order him to make immediate monthly payments to Wife as opposed to utilizing a QDRO, at the end of the motion to correct error hearing the trial court vowed to look at the issue again by analyzing both *Hughes* and *Harvey*. By not ruling on Husband's motion to correct error, thereby letting its initial decision stand, it is apparent that the trial court—after further consideration of the issue—did not feel constrained by *Hughes* to order Husband to make immediate monthly payments to Wife. Otherwise, it would have ruled on Husband's motion to correct error. Because Indiana Code § 31-15-7-4 and case law permit either immediate monthly payments or QDRO in dividing early retirement benefits, the trial court did not misinterpret the law.

The question then becomes whether the trial court abused its discretion in dividing the asset in the manner that it did. The record shows that the parties were married for nine years and did not have any children together. Wife was deemed disabled three years into the parties' marriage and no longer works. Husband, however, continues to work at GM. Applying the deferential standard of review for division of marital property, we cannot conclude that the trial court in this case abused its discretion in ordering Husband to make immediately monthly payments of \$422 to Wife for her share of the value of his early retirement benefit even though he was not retired.

Affirmed.

BAKER, C. J., and BAILEY, J., concur.