

Case Summary and Issues

Kenneth Hawkins appeals the trial court's judgment dissolving his marriage to Debra Hawkins. For our review, Kenneth raises three issues, which we reorder and restate as: 1) whether the trial court erred by dividing property that was the subject of the 2003 decree dissolving the parties' previous marriage to each other; 2) whether the trial court's findings of fact erroneously recited instances of Kenneth's negative behavior that were unrelated to the disposition or dissipation of marital property; and 3) whether the trial court abused its discretion by assigning a value of \$181,800 to Kenneth's vested pension without consideration of the present value of the benefits. Finding no error as to the first two issues, but concluding the trial court abused its discretion in its valuation of Kenneth's pension, we affirm in part and remand.

Facts and Procedural History

Kenneth and Debra first married on March 21, 1992. Their first marriage ended by an agreed dissolution decree of May 1, 2003. Pursuant to this decree, Kenneth was awarded the marital home on Sunbow Lane and was ordered to pay Debra forty percent of the equity or proceeds resulting from refinancing or selling the home. Debra was awarded the 2000 Oldsmobile Intrigue and Kenneth was awarded the remaining vehicles including the 2002 Harley Davidson motorcycle. Each party was to keep his or her respective retirement accounts, and no particular dollar value was assigned to any of the marital property. The 2003 decree specified that the parties "acknowledge and agree no modification or waiver of

any of the terms of this Decree shall be valid unless in writing and executed by both parties.”

Appendix of Appellant at 22.

In the months following the May 2003 decree, Kenneth and Debra remained in contact, and Debra moved back into the marital home in July 2003. They refinanced the home in both of their names, Debra consented to Kenneth using \$20,000 in proceeds from the refinancing to pay off a lien on his motorcycle, and Kenneth never paid Debra the forty percent from the refinancing.

Kenneth and Debra remarried on April 16, 2004. They did not execute any pre- or post-nuptial agreement relative to their remarriage.

On November 3, 2008, Debra filed for dissolution of marriage. The parties’ attempts at mediation were unsuccessful, and on January 11, 2010, the trial court held a hearing at which property division was the primary contested issue. The trial court received evidence that Kenneth had been a member of the local sheet metal workers’ union and accrued union pension benefits since 1985. It was undisputed that his pension was vested although he had not yet retired or begun to receive benefits. At the close of the hearing, the trial court issued its ruling dissolving the parties’ marriage and took the issue of property division under advisement.

On April 21, 2010, the trial court issued a final order with findings of fact and conclusions of law. The trial court’s findings state in relevant part:

9. Within ninety days following the [May 2003] decree of dissolution, it is clear the parties determined they would not follow that decree. They began to reconcile their differences and cooperated with one another to refinance the mortgage, not to allow Debra to receive her distribution of the marital assets,

but to keep the property in their joint names. Additionally, rather than pay a distribution to Debra, they used the proceeds to satisfy a debt distributed by the prior agreement to Kenneth. Acting in such a manner established their clear intent to remain a couple and to act in their joint interests rather than in their individual interests.

10. As a result, all individual interests awarded by their prior agreement became joint interests once again when the parties reconciled and remarried.

* * *

24. Debra presented documentation in the form of a *Sheet Metal Workers Local Number 20 Indianapolis Area Pension Fund Summary Plan Description* . . . without objection from Kenneth. Based upon the information contained in the document, Debra estimated Kenneth's total monthly income from the local plan after retirement, computed using the retirement credits Kenneth had accrued as of the date of separation, to be \$1,313.00 per month, an increase of \$305.50 per month over the amount he would have earned at retirement based upon the credits accrued as of the date of their second marriage.

25. Debra estimated the total cash value of the fund to be \$181,800.00. Kenneth, using the same pension credit information, estimated the total value of the pension to be \$14,400.00. Debra's testimony of the value of the retirement plan was more credible than was Kenneth's and the court adopts the value of the plan as \$181,800.00.

Id. at 10-12.

The trial court divided the marital property such that Debra would receive:

- The Sunbow Lane home, valued at \$132,812
- Debra's Covance 401(k), valued at \$72,000
- Chase Bank account, valued at \$5,000
- 2000 Oldsmobile Intrigue, valued at \$2,000

To Kenneth, the trial court awarded:

- Kenneth's Local Union Pension Fund, valued at \$181,800
- Kenneth's Local Union Defined Plan, consisting of stock valued at \$4,654
- 2002 Harley Davidson motorcycle, valued at \$14,000

- 2006 Ford Lariat pickup truck, valued at \$13,000
- Link FCU account, valued at \$8,000
- Other personal property, valued at \$6,950 altogether

As to liabilities, the trial court awarded Debra the balance of the mortgage and half the parties' tax liability, for a total of \$34,569, and to Kenneth the outstanding debt on the Ford Lariat and half the parties' tax liability, for a total of \$12,068.

The trial court calculated that the above division led to a net distribution to Debra of \$177,243, and to Kenneth of \$216,335. The trial court computed half the difference between these two sums as \$19,546 and ordered Kenneth to pay Debra that amount as an equalization payment within 180 days. Kenneth filed a motion to correct error, which after the passage of time was deemed denied without a hearing. Kenneth now appeals.

Discussion and Decision

I. Standard of Review

When reviewing a trial court's judgment that includes findings of fact and conclusions of law, this court "shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous only if the trial court's findings do not support its conclusions of law or its conclusions of law do not support its judgment. Id. When, as here, the trial court entered findings and conclusions sua sponte, the specific

findings control only as to the issues they cover, and a general judgment standard applies to any issue upon which the trial court has not made findings. Breeden v. Breeden, 678 N.E.2d 423, 425 (Ind. Ct. App. 1997).

The trial court's valuation of an asset in a marriage dissolution proceeding is reviewed for an abuse of discretion. Bingley v. Bingley, 935 N.E.2d 152, 154 (Ind. 2010). "With respect to findings of fact about an asset's value, a trial court has not abused its discretion if sufficient evidence and reasonable inferences support that valuation." Id. Questions of law, however, are reviewed de novo. Id.

II. Effect of 2003 Dissolution Decree

Kenneth argues that the trial court erred when it distributed property that was the subject of the settlement agreement incorporated into the parties' 2003 dissolution decree. He contends that because the parties never executed a written waiver or modification of the 2003 settlement agreement, it remained binding and the trial court was not free to divide their property in a different manner. We disagree because Kenneth's argument fails to account for the parties' almost immediate repudiation of the 2003 settlement agreement and their remarriage in 2004.

"[P]roperty settlement agreements are not automatically terminated by the subsequent reconciliation of the parties absent clear proof the parties so agreed or intended." Brinkmann v. Brinkmann, 772 N.E.2d 441, 448 (Ind. Ct. App. 2002). The trial court cited Brinkmann and found that Kenneth and Debra's actions in the months following the 2003 decree, particularly in regard to the marital home which they refinanced in both their names and the

proceeds which were not distributed to Debra as the decree ordered, clearly proved their intent to terminate the settlement agreement. Kenneth does not challenge this finding, and even if he did, we could not conclude it is erroneous.

Moreover, even if Kenneth and Debra each owned some property individually as a result of the first dissolution, the trial court properly found that all the property came back into the marital pot when they remarried each other. See Ind. Code § 31-15-7-4(a) (providing that marital property subject to division includes property “owned by either spouse before the marriage”); Ind. Code § 31-9-2-98(b) (defining “property” to include “all the assets of either party”); see also In re Marriage of Preston, 704 N.E.2d 1093, 1098 (Ind. Ct. App. 1999) (concluding that “[a]lthough [Husband]’s retirement plan became his separate property under the first dissolution decree, he remarried [the same Wife] without an antenuptial agreement. Consequently, in this second dissolution, his entire retirement plan was once again marital property subject to an equitable division.”). For purposes of the present dissolution, the 2003 decree is not controlling and the trial court did not err by disregarding it.

III. Findings Regarding Kenneth’s Behavior

Kenneth takes issue with the trial court’s findings of fact numbered 11, 12, 14, 15, and 29. These findings refer to an allegation of domestic violence committed by Kenneth against Debra, his arrest on a charge of intimidation, Debra’s obtaining a civil order for protection against Kenneth, his subsequent conviction of intimidation, his violation of the protective order by telephoning Debra on one occasion, and his frequently disruptive conduct during the final dissolution hearing. Rather than disputing their factual correctness, Kenneth argues

these findings were improper, citing the principle that fault is irrelevant in contemporary dissolution proceedings and that “[t]he conduct of the parties during the marriage – except as it relates to the disposition or dissipation of property – is irrelevant to the trial court’s division of marital assets.” Brief of Appellant at 8 (quoting R.E.G. v. L.M.G., 571 N.E.2d 298, 301 (Ind. Ct. App. 1991)).

While we agree that Kenneth’s negative behavior is irrelevant because it does not relate to the disposition or dissipation of property, the question then becomes whether the trial court properly awarded Kenneth his one-half of the property. Kenneth does not argue that the trial court improperly deviated from the statutory presumption that an equal division of property is just and reasonable, see Ind. Code § 31-15-7-5, and the trial court’s findings of fact and conclusions of law make clear that it aimed to equally divide the parties’ assets and debts. Nothing in the trial court’s conclusions of law, or in its findings that distribute particular assets and debts, indicates that it relied on Kenneth’s negative behavior in making the property division. Thus, any error in the trial court’s findings concerning Kenneth’s behavior does not make its judgment clearly erroneous and is not grounds for reversal. See Lasater v. Lasater, 809 N.E.2d 380, 398 (Ind. Ct. App. 2004) (“Findings, even if erroneous, do not warrant reversal if they amount to mere surplusage and add nothing to the trial court’s decision.”).

IV. Pension Valuation

Kenneth argues that the trial court abused its discretion by assigning a value of \$181,800 to his pension. Initially we observe that in a dissolution proceeding, the trial court

shall divide the property of the parties, whether owned by either spouse before the marriage, acquired by either spouse in his or her own right after the marriage and before the date of final separation, or acquired by the spouses' joint efforts. Ind. Code § 31-15-7-4(a). "Property" is defined as all the assets of either or both parties, including "a present right to withdraw pension or retirement benefits" as well as "the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested . . . but that are payable after the dissolution of marriage." Ind. Code § 31-9-2-98(b).

In setting a valuation date for a pension, the trial court has discretion to select any date between the filing of the dissolution petition and the date of the final hearing. Granzow v. Granzow, 855 N.E.2d 680, 685 (Ind. Ct. App. 2006). In assigning a dollar value to vested pension benefits payable after the dissolution, the trial court, as a general rule, should reduce the future payments to their present value. See Bingley, 935 N.E.2d at 157-58 (observing that employer-provided health insurance could be valued by "discounting to present value" the projected future premiums the employer agreed to pay); Alexander v. Alexander, 927 N.E.2d 926, 939 (Ind. Ct. App. 2010) (noting that when valuing a vested pension, trial courts "must determine the value of the asset as it is currently held because trial courts cannot divide future earnings of a party"), trans. denied. Because a dollar now is worth more than a dollar ten years from now, Kenneth's receipt of his pension over time following his retirement is worth less than the same dollar amount divided between Kenneth and Debra now.

At the final dissolution hearing, neither Kenneth nor Debra presented evidence regarding the present value of Kenneth's pension, only evidence regarding the amounts

payable to him over time after he retires. Debra's proposed value of \$181,800 was derived from multiplying \$12,120 per year (Kenneth's estimated pension benefit based on 20.2 vested credits) by a life expectancy of 15 years beyond retirement age. See Appellee's Response Brief at 5-6. The trial court adopted Debra's calculation as being more credible than Kenneth's¹ and did not reduce the future pension payments to their present value. However, in his motion to correct error, Kenneth argued that use of "standard present-value calculations" would require assigning a considerably lower value to his pension, at most \$86,729. App. of Appellant at 88. Kenneth's motion to correct error requested that the trial court hold a hearing to determine the proper value of his pension, presumably based upon evidence concerning its present value. The trial court did not set the motion to correct error for hearing and permitted it to be deemed denied by the passage of time.

On appeal, Kenneth makes several arguments for concluding the trial court abused its discretion by adopting Debra's proposed value of \$181,800, among them that Debra's counsel conceded that value "has not been present valued," tr. at 28. To the extent Kenneth's remaining arguments merely show that the trial court could have arrived at a different value based on the evidence presented, they do not establish an abuse of discretion by the trial court.² The issue then becomes whether under the facts and circumstances of this case it was

¹ Kenneth's value of \$14,400 was apparently based upon excluding from the calculation all pension credits that accrued to him before the parties' remarriage in April 2004. See Transcript at 25 (Kenneth objecting to testimony concerning pension credits that accrued prior to April 2004 remarriage).

² Kenneth also argues that a small fraction of the pension credits included in the trial court's valuation accrued after the marital pot closed and are not divisible marital property. Kenneth identifies these pension credits as those that accrued between November 3, 2008, when the dissolution petition was filed, and the end of 2008, the year that formed the basis for Debra's and the trial court's valuation. However, the pension service review document that lists Kenneth's credits lists them only by year, not by month or exact date, and thus did not enable the trial court to parse out how much, if any, of the 0.70 credit Kenneth accrued in 2008

an abuse of the trial court's discretion to value Kenneth's pension – the single largest marital asset by the trial court's calculation – without reference to its present value. This court addressed a similar issue under somewhat different circumstances in Wyward v. Wyward, 771 N.E.2d 754 (Ind. Ct. App. 2002).

In Wyward, the husband, who had not yet retired, was entitled to vested pension benefits with a present value, as explained by the parties' respective experts, ranging between \$340,897 and \$518,174. However, the trial court valued the pension at only \$32,409.53, the amount the husband had paid into the pension fund and that his estate would receive should he die before retiring. The wife appealed and we reversed, concluding the trial court abused its discretion by not valuing the pension within the range of evidence presented regarding its present value. Id. at 758. Judge Baker dissented, arguing that the balance of equitable considerations, including the pension's illiquidity, the risk that full benefits might not be received, the husband's ineligibility to receive social security benefits along with the pension, and the trial court's award of 63% of the marital assets to the wife, made a lower valuation of the pension within the trial court's discretion. Id. at 759-60 (Baker, J., dissenting). Judge Baker also was "reluctant to impose high burdens on litigants in dissolution actions . . . to require a specific articulation of values by experts with regard to certain marital assets," observing that "[s]uch exactitude should not be required, inasmuch as it is the overall distribution of the assets that is relevant – not the valuation of a single asset or benefit." Id. at 760.

came after the November 3 separation date. See App. of Appellant at 27. The trial court made a reasonable approximation in allocating the entire seven-tenths of a credit within the marital pot.

The Wyward majority and dissenting opinions are both instructive on the somewhat different issue presented here. The present case differs from Wyward in that the trial court did not fail to value Kenneth's pension within the range of evidence presented, insofar as no evidence was presented at the final hearing concerning the pension's present value. Yet Kenneth did place at issue the trial court's overvaluation of the pension by arguing for a substantially lower value than the trial court assigned and, in his motion to correct error, specifically requesting that the trial court use a proper present value. The equitable considerations cited by Judge Baker in Wyward as reasons for upholding a lower valuation of the pension, when transposed here, cut against the trial court's finding which values Kenneth's pension above its present value. To the extent the illiquidity and degree of risk associated with a pension may justify valuing it at less than the present value of projected future payments, they likewise underscore the importance of reducing the future payments to their present value rather than using inflated future values. Further, while exactitude in valuing particular assets is not necessary unless relevant to the overall distribution of assets, here Kenneth's pension is the single largest marital asset by the trial court's calculation, such that valuing it correctly is essential to maintaining the balance and overall equity of the property distribution.

We also point out that had the trial court divided the pension and awarded half of it to Debra if and when Kenneth receives it in the future, then the trial court would not need to find a present value because the parties would equally share the extent to which future payments are worth less than a cash distribution now. But based on the reasoning above, the

trial court must assign a present value in order to award Kenneth the entire pension or to award Debra half its value now.

We conclude that the trial court abused its discretion by not assigning a present value to Kenneth's pension when Kenneth disputed the trial court's valuation, he specifically requested in his motion to correct error that the trial court assign a present value, and the disputed valuation is material to the overall equitable distribution of the marital assets. We remand this case to the trial court with instructions to hold an evidentiary hearing on the proper value of Kenneth's pension, and in the event the parties present evidence concerning the pension's present value, to assign a value within the range of that evidence. The trial court is also instructed to reconsider the division of assets and make any change to Kenneth's equalization payment to Debra that may be necessary for an equal or otherwise equitable division in light of any new value assigned the pension. See Bingley, 935 N.E.2d at 158 (remanding for further proceedings on the valuation of husband's benefits "and reconsideration of the division of assets").

Conclusion

The trial court did not err by dividing the parties' marital property that previously was the subject of the 2003 decree dissolving their previous marriage to each other, and did not commit reversible error by including in its findings of fact surplus observations concerning Kenneth's negative behavior. However, the trial court abused its discretion by assigning a value of \$181,800 to Kenneth's pension without consideration of the present value of the

benefits, and we therefore remand for further proceedings as outlined above. In all other respects the trial court's judgment is affirmed.

Affirmed in part and remanded.

RILEY, J., and BROWN, J., concur.