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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES A. WARNSLEY,

Appellant,

vs.

SHEILA A. WARNSLEY,

Appellee.

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No. 45A03-0605-CV-198

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable James Danikolas, Judge
Cause No. 45D03-0209-DR-2076

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Charles A. Warnsley (“Husband”) appeals the trial court’s order dissolving his marriage to Sheila A. Warnsley (“Wife”).

We reverse and remand with instructions.

ISSUE

Whether the trial court erred in valuing Husband’s retirement fund.

FACTS

Husband and Wife were married on November 25, 1972. On September 27, 2002, Wife filed a petition for dissolution of marriage. As of November 12, 2002, Husband’s 401(k)-retirement fund was valued at \$72,306.74.

On April 1, 2003, the trial court entered a provisional order, ordering that Husband pay \$1,780.00 per month to Wife for living expenses, including monthly credit card payments in the amount of \$194.00. The trial court ordered that the \$1,780.00 per month be paid from Husband’s 401(k). On July 30, 2003, the trial court entered an amended provisional order, retroactive to June 6, 2003, ordering that Wife be responsible for her monthly credit card payments. Thus, \$1,586.00 was to be paid from Husband’s 401(k) to Wife per month.

The trial court held a final hearing on June 30, 2004. The parties offered, and the trial court admitted into evidence, identical exhibits showing that Husband’s 401(k) had a value of \$73,106.26 as of January 1, 2003 and a value of \$64,968.83 as of December 31, 2003. The parties’ exhibits also indicated that a total of \$18,733.22 had been withdrawn from Husband’s 401(k) during 2003. The trial court also admitted into evidence

Husband's exhibit stating that Husband's 401(k) payments totaled "\$27,543.00/2[.]" (Ex. H).

On September 7, 2004, the trial court entered its decree of dissolution. The trial court found, in pertinent part, as follows:

That at the time of the filing [Husband] had a 401(K) valued at \$74,107.52, but that during the course of the dissolution the parties used these funds at the rate of \$1500.00 per month for approximately 6 months to pay for marital expenses. Therefore this Court values the 401(K) for distribution purposes at \$64,988.83.

(App. 16). The trial court further found "no reason to deviate from the 50-50 split of the marital assets," (App. 17) distributing the assets as follows:

[Wife]		[Husband]	
Marital Residence	\$31,289.00	Mississippi Property	\$19,420.00
Her 401(K)	\$48,064.96	His 401(K)	\$64,988.83
Cash from Husband	<u>\$10,441.96</u>	His IRA Rollover	\$ 3,344.06
		His 1999 GMC	\$12,485.00
		Cash to Wife	<u>(\$10,441.96)</u>
Total to [Wife]	\$89,795.92	Total to [Husband]	\$89,795.93

(App. 18). Thus, the trial court ordered "[t]hat for a more fair and equitable distribution of the marital assets, [Husband] shall pay to [Wife] the sum of \$10,441.96 cash." (App. 18).

Husband filed a motion to correct error on October 5, 2004. Husband asserted the trial court erred in finding that \$1,500.00 was withdrawn from Husband's 401(k) to pay marital expenses per month for only six months, where "\$32,301.00 was taken from [Husband]'s 401K for payment of the marital expense[s]." (App. 20). Following a hearing, the trial court denied Husband's motion to correct error.

On December 8, 2004, Husband filed a motion to transfer and a motion to reconsider. Subsequently, both parties filed various motions. On November 9, 2005, the trial court set aside all orders entered since September 7, 2004 and affirmed the decree of dissolution. Additional facts will be provided as necessary.

DECISION

Husband asserts that the trial court improperly valued his 401(k) at \$64,988.83. A trial court has broad discretion in ascertaining the value of property in a dissolution action. *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1191 (Ind. Ct. App. 2001). We will find no abuse of discretion if the trial court's decision is supported by sufficient evidence and reasonable inferences therefrom. *Id.*

Here, the trial court admitted into evidence the parties' exhibits showing that Husband's 401(k) had a value of \$64,988.83 on December 31, 2003, which reflected withdrawals during 2003 in the total amount of \$18,733.22. Furthermore, during his opening statement, Wife's counsel stated that six payments of \$1,500.00 each were made "from January to June" of 2004. (Tr. 8). This statement constituted a judicial admission of fact. *See Maldonado by Maldonado v. Gill*, 502 N.E.2d 1371, 1372 (Ind. Ct. App. 1987) (finding that an attorney's clear and unequivocal admission of fact during an opening statement constitutes a judicial statement that binds the client), *trans. denied*. Thus, according to the evidence presented, \$9,000.00 was withdrawn from Husband's 401(k) account in 2004.

Here, the trial court found that at the time of the filing of the petition for dissolution in 2002, Husband's 401(k) had a value of \$74,107.52, "but that during the

course of the dissolution the parties used these funds at a rate of \$1500.00 per month for approximately 6 months to pay for marital expenses.” (App. 16). The trial court then valued Husband’s 401(k) at \$64,988.83 for distribution purposes.

According to the evidence, however, Husband’s 401(k) had a value of \$64,988.83 at the end of 2003, with \$9,000.00 withdrawn in 2004 pursuant to the provisional order. Thus, at the time of the final hearing, Husband’s 401(k) would have had a value of approximately \$55,988.83.¹ The trial court’s finding that Husband’s 401(k) had a value of \$64,988.83 was against the logic and effect of the facts and circumstances that were before it. We therefore find the trial court erred in valuing Husband’s 401(k) at \$64,988.83.

Given that the trial court found “no reason to deviate from the 50-50 split of the marital assets,” (App. 17) we reverse the trial court’s order and remand with instructions to enter an order, distributing the parties’ assets as follows:

Wife		Husband	
Marital Residence	\$31,289.00	Mississippi Property	\$19,420.00
Her 401(K)	\$48,064.96	His 401(K)	\$55,988.83
Cash from Husband	<u>\$ 5,941.96</u>	His IRA Rollover	\$ 3,344.06
		His 1999 GMC	\$12,485.00
		Cash to Wife	<u>(\$ 5,941.96)</u>
Total to Wife	\$85,295.92	Total to Husband	\$85,295.93

¹ This amount does not take into account market fluctuations.

We further reverse and remand with instructions to vacate the judgment against Husband in the amount of \$10,441.96 and enter a new judgment against Husband and in favor of Wife in the amount of \$5,941.96.

Reversed and remanded with instructions.

KIRSCH, J., and MATHIAS, J., concur.