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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF)	
STEVEN B. SEXTON and)	
DEBORAH L. SEXTON,)	
)	
STEVEN B. SEXTON,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 11A04-0612-CV-716
)	
DEBORAH L. SEXTON,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE CLAY SUPERIOR COURT
The Honorable Matthew Headley, Special Judge
Cause No. 11D01-0311-DR-468

October 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Steven B. Sexton appeals the division of marital property in the dissolution of his marriage to Deborah L. Sexton. He claims the court erred in finding certain of his retirement benefits were vested and erred in dividing the marital assets equally between the parties. We affirm.

FACTS AND PROCEDURAL HISTORY

The parties married in 1969 and raised three children who are now emancipated. When the children were small, Deborah stayed home with them and worked as a babysitter and beautician. Steven worked for Pfizer from September 1976 to January 2005, when he began receiving long-term disability benefits from Pfizer and the Social Security Administration. His current monthly benefits are \$1,085.00 from Pfizer and \$1,640.00 from the SSA. Deborah's annual pre-tax income is \$38,973.26.

After a hearing, the court entered the following order, with findings and conclusions pursuant to Steven's request:

FINDINGS OF FACT

1. The parties were married on June 20, 1969 and separated on or about November 12, 2004. Parties had children born of this marriage but those children are now adults. The marriage is irretrievably broken pursuant to Indiana Law. During the school age years of the children, [Deborah] was a stay at home mother and part-time beautician and [Steven] worked for Pfizer.

2. The assets of the marriage consist of:
[The list includes a "Pfizer Retirement Annuity Plan" valued at \$67,203.00. The total value of all assets is \$302,548.11.]

3. Parties Income: That [Deborah] has an annual income of approximately thirty nine thousand dollars (\$39,000.00) through her employment with Pfizer. [Steven] receives one thousand six hundred forty dollars (\$1,640.00) per month social security disability and one thousand eighty five dollars (\$1,085.00) per month long term disability through Pfizer, for a total of thirty two thousand seven hundred dollars (\$32,700.00) per year.

4. Family Heirlooms: Testimony was given regarding personal property given or inherited by the respective parties. These items shall be the sole property of the party requesting said property and not included in the marital distribution.

5. Financial obligations pending final divorce: The parties were to respectively keep current the ongoing “revolving credit” debt during the pendency of this action. A substantial amount of testimony was spent and even a contempt citation filed on these issues. Those include: Victoria Secret, Terre Haute First loan, Lowe’s credit card and J.C. Penney’s.

6. Personal Property: Parties acquired personal property throughout their marriage, substantial testimony was offered in regards to the personal property, it’s [sic] value, its location and even its existence.

7. Respondent/Husband’s request for greater than 50/50 split: [Steven] requested a greater percentage of the marital pot due to his employment limitations.

8. Respondent/Husband’s Pfizer Retirement Account: [Deborah] presented a document regarding approximately sixty seven thousand dollars (\$67,000.00) in [Steven’s] retirement account. At first [Steven] claimed he did not know anything about it, then [Steven] claimed he was not vested in the account. The Court finds that there is credible evidence that this account is in existence and values it at the given figure.

CONCLUSIONS OF LAW

1. The marriage is irretrievably broken and is dissolved.

2. [Steven] requested that he receive a greater portion of the marital estate due to his disability. However, the Court does not find that he is entitled to a greater share, due to close approximate income, that his income is virtually “guaranteed” due to it being a combination of government payments and retirement benefits and that [Deborah’s] income is not “guaranteed”. Moreover, the conduct of the parties may also be received by the Court, which the Court finds [Steven’s] conduct less than forthright regarding personal property and debt paying. As such, the Court finds that the following division shall take place:

[Deborah receives \$125,902.73. Steven receives \$101,645.23, including the Pfizer retirement account.]

The parties are ordered to sell the remaining personal property . . . at auction along with the marital residence. [Deborah] is to include all Longenberger [sic] baskets that were not previously disclosed at the personal property valuation. The net proceeds will be used to equalize the marital assets. Said auction should take place no later than December 31, 2007.

(Appellant’s App. at 12-15.)

DISCUSSION AND DECISION

Because the trial court entered findings and conclusions, we apply a two-tiered standard of review. *In re Marriage of Turner*, 785 N.E.2d 259, 263 (Ind. Ct. App. 2003). First we determine whether the evidence supports the findings, and then we determine whether the findings support the conclusions. *Id.* We will not set aside the findings unless they are clearly erroneous. *Augspurger v. Hudson*, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004). Findings of fact are clearly erroneous if they are unsupported by the evidence, or reasonable inferences therefrom, in the record. *Bertholet v. Bertholet*, 725 N.E.2d 487, 495 (Ind. Ct. App. 2000). We may not reweigh the evidence or reassess the credibility of the witnesses, *Augspurger*, 802 N.E.2d at 509, and we consider only the evidence most favorable to the trial court's judgment. *Turner*, 785 N.E.2d at 263.

1. Inclusion of Pfizer Account

Steven claims there was "little or no evidence" from which the court could find he had any vested pension benefits. (Appellant's Br. at 16.) We disagree.

The first page of Deborah's Exhibit 15 indicates Steven has two benefits from Pfizer. One is the "12/31/93 Accrual" benefit, while the other is a "Post-1993 Accrual" benefit. (App. at 16.) The 12/31/93 Accrual benefit may be obtained at "age 50, or anytime thereafter." (*Id.* at 17.) However, "[t]he earliest [Steven] may elect to receive [his] post-1993 benefit accrual is age 55." (*Id.*)

Steven is over 50 years old and is eligible to access his 12/31/93 Accrual benefit. The fourth page of Exhibit 15 explains the payment options available for the 12/31/93 Accrual. One of those payment options is an "Immediate Lump Sum Payment in Lieu of

Monthly Pension.” (*Id.* at 19.) The lump sum payment available is “\$67,685.59.” (*Id.*) This evidence supports finding Steven’s Pfizer account was vested and had a present value of approximately \$67,000.00.

Steven notes he “testified that it was not vested, that he had no present right to withdraw from or liquidate it and that Pfizer could change modify or eliminate the Plan and his schedule of benefits at any time.” (Appellant’s Br. at 16-17.) However, that evidence is not favorable to the court’s judgment and we therefore may not consider it while conducting our review. Moreover, the court’s Finding 8 and Conclusion 2 suggest the court questioned Steven’s credibility, and we may not second guess the court’s judgment regarding credibility.

2. Division of Assets

Division of the assets between divorcing parties is left to the trial court’s discretion. *Akers v. Akers*, 729 N.E.2d 1029, 1031-32 (Ind. Ct. App. 2000). Even if the facts and reasonable inferences might allow us to reach a conclusion different from that of 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. *Id.*

A party challenging a property division must “overcome a strong presumption that the court considered and complied with the applicable statute.” *Id.* (quoting *In re Marriage of Bartley*, 712 N.E.2d 537, 542 (Ind. Ct. App. 1999)). We consider the court’s disposition of marital property “as a whole, not item by item.” *Krasowski v. Krasowski*, 691 N.E.2d 469, 473 (Ind. Ct. App. 1998). When we review the division, our focus is on what the court did, not what the court could have done. *Akers*, 729 N.E.2d at 1032.

The court's goal is to divide the marital property in a just and equitable manner.

Ind. Code § 31-15-7-4(b). Section 5 of Ind. Code ch. 31-15-7 provides:

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.

The court declined Steven's request for the marital pot to be divided unequally, and we reject his assertion the statutory factors required the court to rule in his favor. Deborah's after-tax income is not substantially greater than the disability payments Steven receives. Moreover, as Steven has qualified for Social Security Disability while Deborah is an at-will employee, we cannot find erroneous the conclusion his stream of income was "guaranteed," while hers was not.

As a final matter, we cannot find error in the court's assignment of assets to each party. Steven claims Deborah received "the bulk of the liquid assets." (Appellant's Br. at 22.) However, Steven received the Pfizer account, which provides him the opportunity

to receive approximately \$67,000.00 “immediately.” Accordingly, we see no abuse of discretion.

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.