MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jennifer Lynn Goetz,

Appellant / Cross-Appellee / Respondent,

v.

James Lawrence Franklin Goetz,

Appellee / Cross-Appellant / Petitioner.

February 24, 2023

Court of Appeals Case No. 22A-DC-1135

Appeal from the Hendricks Superior Court

The Honorable Mark A. Smith, Judge

Trial Court Cause No. 32D04-2105-DC-330

Memorandum Decision by Judge Robb
Judges Mathias and Foley concur.

Robb, Judge.

Case Summary and Issues

[1] In 2011, James Goetz ("Father") and Jennifer Goetz ("Mother") married. They have four children together. In 2021, Father filed a petition for dissolution of marriage. Following an evidentiary hearing, the trial court issued a Decree of Dissolution of Marriage, Child Custody, Parenting Time and Child Support Order and Order Dividing the Marital Estate ("Dissolution Decree"). Mother now appeals, raising multiple issues for our review, which we restate as: (1) whether the trial court abused its discretion by excluding Father's military pension from the marital estate; and (2) whether the trial court abused its discretion by granting Father equal parenting time. Father cross-appeals raising one issue for our review, which we restate as whether the trial court abused its discretion in allocating marital assets. Concluding the trial court did not abuse its discretion by excluding the military pension from the marital pot, allocating marital assets, or awarding parenting time, we affirm.

Facts and Procedural History

[2] Father served in the United States Air Force on active duty from 2001 to 2007. In 2007, he transitioned to the United States Air Force Reserve. On October 15, 2011, Father and Mother were married. The couple had four children together. During their marriage, and prior to the birth of their first child, Mother was a

teacher. Mother left her employment to take care of the children and the household. Father supported the family financially.

[3] On May 18, 2021, Father filed a petition for dissolution of marriage. On August 13, a Guardian Ad Litem ("GAL") was appointed for the children. Shortly before the final dissolution hearing, the GAL filed a written report, wherein the GAL opined that:

> Sharing joint legal custody would be very difficult. The parties disagree on the issues of religion and education and they do not effectively communicate. Additionally, Mother has an order of protection against Father.

Appellant's Appendix, Volume II at 61. However, the GAL ultimately recommended that Mother and Father should share joint legal custody. The GAL also recommended that Mother be granted primary physical custody with Father receiving parenting time on alternating weekends and every Tuesday with the possibility that the weeknight visit be an overnight, and holidays and specials days split pursuant to the Indiana Parenting Time Guidelines. *See id.* at 65-67.

[4] On December 21, Father's military pension vested. For Father's pension to vest he was required to accumulate twenty years of creditable service. A year was considered creditable if Father received at least fifty points. During the proceedings, Mother hired Dan Andrews to evaluate Father's pension. Andrews testified that prior to marriage Father had earned 2,650 points and had earned 3,190 points at the time his pension vested. *See* Transcript of

Evidence, Volume 2 at 210. In other words, about 16% of Father's points were earned during his marriage.

[5] At the evidentiary hearing in March 2022, Mother asked that if the trial court found she was not entitled to Father's pension, she be given an unequal division of the marital estate. Mother testified that on June 3, 2021, she paid off Chase and Capital One credit cards that she had used during the marriage as well as after the parties' separation, using funds from the State Bank of Lizton joint account ("Joint Account") shared by her and Father. Further, Mother stated that she paid $2,500 in attorney's fees from the Joint Account.

[6] On April 19, 2022, the trial court issued the Dissolution Decree. The trial court awarded Mother sole legal custody and primary physical custody of the children subject to Father's parenting time and ordered:

> Father shall have parenting time every other weekend from Friday after school through Monday morning when the children go back to school or daycare and every Wednesday and Thursday overnight. Mother shall have alternated weekends and every Monday and Tuesday overnight.

Appealed Order at 4. The remaining parenting time, including holidays and breaks, is governed by the Indiana Parenting Time Guidelines.

[7] Regarding Father's military pension, the trial court found:

> [Father's] military retirement benefit at the time of the parties' separation was not vested as he accrued twenty years of military service months after his Petition for Dissolution of Marriage was

> filed. The asset became vested and available to [Father] when he accrued his twenty years of credit service December 15, 2021. None of the military retirement benefit should be included in the marital estate sheet as the benefit did not vest until after the parties' date of separation and most of it was earned prior to the parties' marriage.

Id. at 10-11. The trial court also determined the Joint Account was "used to pay ongoing marital bills" and awarded it to Father. *Id.* at 12. The trial court's division of assets sheet states that this account was valued at $11,397.34. In total, the trial court awarded Mother 65% of the marital assets and awarded Father 35%.

[8] Mother now appeals and Father cross-appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Division of Marital Assets

A. Standard of Review

[9] The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1191 (Ind. Ct. App. 2001). When a trial court enters sua sponte findings of fact and conclusions of law pursuant to Trial Rule 52(A), we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. *Morgal-Henrich v. Henrich*, 970 N.E.2d 207, 210 (Ind. Ct. App. 2012). Sua sponte findings

control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. *Id.* However, the trial court's findings and conclusions will be set aside only if they are clearly erroneous; that is, if the record contains no facts or inferences supporting them. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*.

[10] When a party challenges the trial court's division of marital property, they 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). We may not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's disposition of the marital property. *In re Marriage of Dall*, 681 N.E.2d 718, 720 (Ind. Ct. App. 1997). In dissolution proceedings, the trial court is required to divide the property of the parties "in a just and reasonable manner[.]" Ind. Code § 31-15-7-4(b). This division of marital property is a two-step process. *O'Connell v. O'Connell*, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008). First, the trial court must ascertain what property is to be included in the marital estate; second, the trial court must fashion a just and reasonable division of the marital estate. *See id*. at 10-11.

B. Military Pension

[11] Mother argues the trial court abused its discretion by not awarding her an interest in Father's military pension. In an action for dissolution of marriage,

the trial court shall divide the property of the parties. Ind. Code § 31-15-7-4(a)(2). Property, for the purposes of dissolution, means all the assets of either party or both parties, including:

> (1) a present right to withdraw pension or retirement benefits;
>
> (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in Section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage; and
>
> (3) the right to receive disposable retired or retainer pay (as defined in 10 U.S.C. 1408(a)) acquired during the marriage that is or may be payable after the dissolution of marriage.

Ind. Code § 31-9-2-98(b). However, only property that is acquired prior to the date of "final separation" is subject to division by the trial court as part of the marital pot. *Crider v. Crider*, 26 N.E.3d 1045, 1048-49 (Ind. Ct. App. 2015). The date of final separation refers to the "date that the petition for dissolution is filed." *Id.* at 1049.

[12] Generally, for a pension to be included in the marital pot it must be vested. *Harris v. Harris*, 31 N.E.3d 991, 997 (Ind. Ct. App. 2015). Mother contends that because Father's pension vested after he filed for dissolution of marriage but before the trial court issued the Dissolution Decree it should have been included

in the marital pot.[1] Mother relies on *In re Marriage of Adams*, 535 N.E.2d 124 (Ind. 1989) to support her argument. In *Adams*, our supreme court held that an Indianapolis Police Department pension was "eligible for inclusion in the disposition of marital assets." 535 N.E.2d at 125. The husband needed to achieve twenty years of service to become eligible for a pension upon retirement. And like the case at hand, the husband reached twenty years between filing for dissolution and the final order. Our supreme court determined the husband's pension was not "property" pursuant to subsections (1) or (3) of the statutory definition and had not vested pursuant to section 411 of the Internal Revenue Code as described in subsection (2) but explained that husband had gained "the right to receive pension or retirement benefits that are not forfeited upon termination of employment[.]" *Id.* at 126. Concluding "the legislature did not intend to exclude police pension benefits for officers with over twenty years of active service who had not yet retired[,]" the *Adams* court held that the pension was marital property subject to division. *Id.*

[13] The police pension in *Adams* fell under the definition of property in Indiana Code section 31-9-2-98(b)(2).[2] However, in *In re Marriage of Battles*, this court stated that military pensions fall under Indiana Code section 31-9-2-98(b)(3).

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[1] Mother also argues she deserves a portion of the pension because the pension increased in value, in part, due to her efforts. Because we determine the military pension was not eligible to be included in the marital pot, we need not address this argument.

[2] *Adams* and *Battles* cite Indiana Code section 31-1-11.5-2(d) for the definition of "property." That section has since been repealed and replaced by Indiana Code section 31-9-2-98(b), which contains identical language. We cite herein to only the current section for clarity.

564 N.E.2d 565, 566 (Ind. Ct. App. 1991). Further, we held that "cases under subsection [(b)](3) differ from those under subsection [(b)](2) and for that reason the decision in [*Adams*] has no application to military pension rights." 564 N.E.2d at 567. At the time of the dissolution hearing in *Battles*, the husband had no vested interest in his military pension. Thus, the timeline of *Battles* does not match the timeline in the case at hand. However, in interpreting the definition of property statute we stated:

> The plain language of the provision requires that in order for disposable retired or retainer pay to constitute property within the ambit of the dissolution act "the *right* to receive [such pay must be] *acquired during* the marriage.

Id. at 566-67. And as stated above, in Indiana, we have held that only property acquired prior to the filing of the petition for dissolution of marriage is subject to division. *Crider*, 26 N.E.3d at 1048-49.

[14] We hold that Father's military pension was not property subject to division because his right to receive payments was not acquired until after he filed for dissolution of marriage, and therefore the trial court did not abuse its discretion in excluding the pension from the marital pot.

C. Joint Bank Account

[15] Father argues the trial court "erred in its asset distribution by failing to consider [Mother's] post-separation withdrawals from the parties' bank accounts, including payment of her attorney fees, and erroneously crediting [Father] with these funds[.]" Brief of Appellee and Cross-Appellant at 25. Father contends the

trial court erred in allocating to him assets that no longer existed. It is well settled the trial court has discretion to select any date between the date of filing the dissolution petition and the final hearing for purposes of valuing a marital asset. *Eyler v. Eyler*, 492 N.E.2d 1071, 1074 (Ind. 1986).

[16] "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 statute requiring a just and reasonable division. *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008). Here, Mother and Father's marital assets were divided by a ratio of 65% to 35%, respectively. Further, the trial court awarded the Joint Account to Father and valued it at $11,397.34. As established by the record, Mother was a stay-at-home mom with little to no income. At the evidentiary hearing, Mother testified she paid off "family outstanding debt" on her credit cards with the Joint Account. Tr., Vol. 3 at 112. The trial court then concluded the Joint Account was "used to pay ongoing marital bills[.]" Appealed Order at 12. Therefore, the trial court valuing the Joint Account as of the time of filing and adding it to Father's distribution was not clearly erroneous. Father's argument to the contrary is merely a request to reweigh the evidence which we will not do. *Dall*, 681 N.E.2d at 720.

[17] The record is clear that Mother did pay some of her attorney's fees from the Joint Account. However, as indicated by the Dissolution Decree, due to the income disparity Father would be responsible for Mother's attorney's fees regardless. Accordingly, given the circumstances, Father has failed to show that the trial court has divided the assets in an unjust or unreasonable manner.

II. Parenting Time

[18] In all parenting time controversies, courts must give foremost consideration to the best interests of the children. *In re Paternity of C.H.*, 936 N.E.2d 1270, 1273 (Ind. Ct. App. 2010), *trans. denied*. Generally, parenting time decisions are committed to the sound discretion of the trial court. *In re B.J.N.*, 19 N.E.3d 765, 769 (Ind. Ct. App. 2014). Therefore, this court will review parenting time decisions for an abuse of discretion. *Hatmaker v. Hatmaker*, 998 N.E.2d 758, 761 (Ind. Ct. App. 2013), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court misinterpreted the law. *Id.* We will not reweigh evidence or reassess the credibility of witnesses. *In re Paternity of G.R.G.*, 829 N.E.2d 114, 122 (Ind. Ct. App. 2005).

[19] Mother argues the trial court abused its discretion by ordering that Father receive "equal parenting time with the children[.]" Amended Appellant's Brief at 14. First, Mother notes that the GAL did not recommend equal parenting time. However, as Mother concedes, the trial court "is not required to accept the opinions of experts regarding custody." *Clark v. Madden*, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000).

[20] Next, Mother points out that both the GAL and trial court concluded that Mother and Father struggle with communicating effectively.[3] In determining if joint legal custody is appropriate under Indiana Code section 31-17-2-15, the court shall consider, among other things, "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare[.]" Here, Mother was given sole legal custody of the children and was granted primary physical custody, just subject to Father's parenting time. We note that no such factor is listed under Indiana Code section 31-17-2-8 which enumerates the court's considerations when making custody decisions as a whole. Further, as a noncustodial parent, Father is entitled to reasonable parenting time unless the court finds that parenting time would "endanger the child's physical health or significantly impair the child's emotional development." Ind. Code § 31-17-4-1. Thus, unless the parties' unwillingness to communicate rose to a level that began to negatively affect the children's physical or emotional well-being, it is not a consideration in the determination to award parenting time.

[21] Still, Mother contends that due to the ages of children the parties will have to communicate a lot and "in a shared parenting time arrangement communication between the parents and an ability to work together is just as paramount to the children's best interests as the ability to communicate is to the

[3] We note that the GAL made this statement but still recommended the parties share joint legal custody of the children.

joint legal custody determination." Am. Appellant's Br. at 17. However, Mother cites no caselaw to support this contention.[4] Further, entertaining any argument concerning the trial court's determination regarding the best interest of the children and its decision to grant Father more parenting time than recommended by the GAL would be tantamount to reweighing the evidence, which we will not do. *In re Paternity of G.R.G.*, 829 N.E.2d at 122.

[22] We conclude Mother has failed to show the trial court abused its discretion by ordering that the parties have equal parenting time.

Conclusion

[23] We conclude the trial court did not abuse its discretion in excluding Father's military pension from the marital pot, allocating the marital assets, or allocating parenting time. Accordingly, we affirm.

[24] Affirmed.

Mathias, J., and Foley, J., concur.

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[4] Mother's only citation is to *Aylward v. Aylward*, which determined that joint legal custody was inappropriate in that case; however, it did not address equal parenting time. 592 N.E.2d 1247, 1252 (Ind. Ct. App. 1992). As stated above, Mother was granted sole legal custody.