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IN THE COURT OF APPEALS OF INDIANA

Jeffery Thomas Maxwell,
Appellant,

v.

Shirley Sue Maxwell,
Appellee.

January 26, 2021

Court of Appeals Case No. 20A-DR-869

Appeal from the Hancock Circuit Court

The Honorable R. Scott Sirk, Judge

Trial Court Cause No. 30C01-1611-DR-1635

Brown, Judge.

[1] Jeffery Thomas Maxwell ("Husband") appeals the trial court's March 27, 2020 order and maintains the court erred in its division of marital property. We reverse in part and remand.

Facts and Procedural History

[2] In our previous memorandum decision in this marital dissolution action, we set forth the following facts:

> The parties had a child, C.M., in April 2002. They married in May 2004, while Husband was in the military. After they married, they had another child, S.M., in September 2005, and D.M. in October 2006. D.M. was born prematurely and has cerebral palsy, which affects his ability to use his legs and arms. D.M. is learning to walk with a walker, but he uses a manual wheelchair except at school, where he uses a motorized wheelchair. Husband retired from the military in 2012 after twenty-one years of service, and he receives a monthly veterans' disability payment. Husband has worked at Eli Lilly in finance and accounting for fifteen years. Wife worked in retail prior to the parties' marriage but stopped working after the marriage. She worked again in retail for a short time in approximately 2006 before D.M.'s birth. After D.M.'s birth, Wife did not return to work.
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> Husband filed a petition for dissolution in November 2016. At this time, Wife found employment as an instructional assistant with a school corporation. She works thirty-five hours a week and is paid $10.50 an hour. This position allows her to be home with the children after school and on school breaks. In late 2017, Eli Lilly notified Husband that his department was being moved to Ireland. At the time of the hearing, Husband anticipated losing his job in March 2018. The parties reached agreements on most issues regarding the children, leaving mainly issues regarding division of the marital estate and maintenance. Husband proposed that he "take on all liabilities associated with the marital estate." [] Husband has a 401K through his employment with Eli Lilly, a pension with Eli Lilly, and a military pension. Wife requested

> caretaker maintenance to care for D.M. and rehabilitative maintenance to complete her college degree online through Ball State University.
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> The trial court entered findings of fact and conclusions thereon. The trial court adopted Wife's proposed division of marital property, resulting in a 60%/40% split in favor of Wife. The trial court ordered that the parties sell the marital residence with Wife receiving the first $8,050.00 of the proceeds and the remaining proceeds split 60%/40% in favor of Wife. The trial court awarded Wife, in part, her vehicle and certain furniture; sixty percent of Husband's gross military pension payment when "such is received by [Husband] or when [Husband] is eligible to receive same;" rehabilitative maintenance in the amount of $750.00 per month for thirty-six months; $7,500 in attorney fees; $44,500.00 from Husband's Eli Lilly 401K, which was valued at $44,500.00; a property settlement judgment in the amount of $68,953.00 payable at the rate of $500.00 per month plus eight percent interest with the payments beginning after the completion of the rehabilitative maintenance payments. [] Husband was awarded, in part, his Eli Lilly pension; the remainder of his military pension; any remainder of his Eli Lilly 401K; his automobile, tools, firearms, and certain furniture; and the remainder of his 2016 Eli Lilly bonus. Husband was ordered to pay the parties' debts and a portion of a handicapped accessible van in the future for Wife's use.

Maxwell v. Maxwell, 30A01-1712-DR-2768, slip op. at 1 (Ind. Ct. App. Aug. 10, 2018) ("*Maxwell I*") (footnote and citations omitted).

[3] Husband appealed and raised several issues regarding division of the marital property. *Id*. at 2. This Court, in *Maxwell I*, held that remand for an equal division of the marital property or an explanation of the reason for deviation was necessary. *Id*. at 3. With respect to Husband's military pension, we remanded "for an order requiring Husband to pay fifty percent of his disposable retired pay of the military pension." *Id*. at 10. With respect to his Lilly

pension, we concluded the court did not err in valuing the pension,[1] was not required to apply a coverture formula, and did not abuse its discretion in utilizing an immediate offset method to distribute the pension benefit through a property settlement judgment rather than a deferred distribution method through a qualified domestic relations order ("QDRO"). *Id*. at 6-8. We also remanded to reduce the monthly amount Husband must pay to Wife in rehabilitative maintenance. *Id*. at 9. The court held a hearing on remand.

[4] On March 27, 2020, the trial court entered an "Order on Remand from Court of Appeals" finding Husband's annual income between his employment and VA benefits to be approximately $126,648 and Wife's annual income to be approximately $21,000. Appellant's Appendix Volume II at 34. The court accepted and adopted Wife's marital balance sheet.[2] The court found that a division in which Wife receives sixty percent of the marital property and Husband receives forty percent is just and reasonable. In dividing the marital property, the court awarded Husband his Lilly pension and his military pension subject to the payments to be made to Wife and ordered that Husband pay Wife an equalization payment in the amount of $68,953.

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[1] In particular, we addressed Husband's argument that Wife's expert improperly added an administrative load and used an incorrect discount rate and the wrong age of eligibility, and we held he was merely requesting that we reweigh the evidence.

[2] The court identified the marital balance sheet as Respondent's Exhibit EE. The spreadsheet in the parties' appendices labeled Respondent's Exhibit EE shows values of $174,148 for Husband's Lilly pension, $149,701 for his military pension, and net marital assets of $366,061.

Discussion

[5] Husband claims the trial court erred in its division of the marital property. He maintains the court failed to (A) follow our instructions on remand with respect to the division of his military pension; (B) consider the tax consequences associated with his pensions; and (C) account for the impact of the terms assigned to his equalization payment plan. He states the court made findings on remand as to its reasons for an unequal division of the marital property but argues the court's errors "resulted in a division not coming 'close to the attempted apportionment' of 60/40." Appellant's Brief at 11 (quoting *Hardin v. Hardin*, 964 N.E.2d 247, 254 (Ind. Ct. App. 2012)).

[6] We set aside findings or a judgment if clearly erroneous, and first we determine if the evidence supports the findings and then if the findings support the judgment. *Quinn v. Quinn*, 62 N.E.3d 1212, 1220 (Ind. Ct. App. 2016). We review legal conclusions de novo. *Id*. A trial court may deviate from an equal division so long as it sets forth a rational basis for its decision. *Kendrick v. Kendrick*, 44 N.E.3d 721, 724 (Ind. Ct. App. 2015), *trans. denied*. This Court generally reviews a trial court's disposition of marital assets as a whole and not item by item, and we determine whether the court has divided the property in a "just and reasonable" manner. *Hardin*, 964 N.E.2d at 252 (citing Ind. Code § 31-15-7-5). In addition, "[w]hen dividing marital property, the trial court must come close to the attempted apportionment[,] otherwise the findings will not support the judgment and we must remand." *In re Marriage of Pulley*, 652

N.E.2d 528, 531 (Ind. Ct. App. 1995) (cited in *Hardin*, 964 N.E.2d at 252), *trans. denied*.

A. *Military Pension*

[7] Husband first argues the trial court failed to follow *Maxwell I* in dividing his military pension. In *Maxwell I*, we stated the trial court had "awarded Wife sixty percent of Husband's gross military pension payment when 'such is received by [Husband] or when [Husband] is eligible to receive same.'" *Maxwell I*, slip op. at 3. We observed Husband argued that federal law prevented the court from awarding Wife more than fifty percent of his net retirement pay from his military pension. *Id*. We remanded "for an order requiring Husband to pay fifty percent of his disposable retired pay of the military pension." *Id*. at 10.

[8] The trial court's March 27, 2020 order following remand provided:

> 50. As previously Ordered in . . . the Findings of Fact, Conclusions of Law and Judgement [sic] entered November 16, 2017, *and as modified in paragraph (e) below*, [Wife] shall have set off to her as her sole and separate property the following:
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> * * * * *
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> e) 50% of the gross monthly payment from [Husband's] US Army pension commencing with the first month said payment is received. Said payments shall be paid directly by [Husband] to [Wife].
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> * * * * *
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> 54. This Court modifies the Findings of Fact, Conclusions of Law and Judgment entered November 16, 2017 and Orders that [Husband] *should pay to [Wife] fifty percent (50%) of his "net disposable retired pay"* as defined by 10 USCA § 1408(4)(a) from the United States Government for his

> U.S. Army Pension when such is received by [Husband] or when [Husband] is eligible to receive the same.

Appellant's Appendix Volume II at 43-45 (emphases added).

[9] It appears the trial court intended for the phrase "and as modified in paragraph (e) below" in its Paragraph 50 to state "and as modified in *paragraph 54* below." (Emphasis added). We remand for clarification.

B. *Taxes*

[10] Husband argues the trial court did not consider the tax consequences associated with his pensions which "results in a division of the marital estate where [Wife] receives a vastly larger amount than the intended 60-40 division." Appellant's Brief at 12. He argues he "is paying taxes on property [Wife] was awarded." *Id*. at 13 n.2. Wife does not assert the court considered the tax consequences but rather that potential future tax consequences are not a proper consideration.

[11] Ind. Code § 31-15-7-7, titled "Tax consequences of property division," provides:

> The court, in determining what is just and reasonable in dividing property under this chapter, shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party.

[12] While Husband is ordered to transfer significant portions of the values of his pensions to Wife (of his Lilly pension by way of an equalization payment[3] and of his military pension by way of payments when he is eligible to receive the benefit), Husband is the party who will receive the pension distributions[4] and will be responsible for taxes on the full amounts of his annual pension benefits. Assigning this tax burden to Husband alone, especially in light of the values of the pensions relative to the value of the marital estate, has the result of significantly altering the trial court's intended 60/40 apportionment. We find that remand is appropriate for the trial court to consider the tax consequences of its disposition and to redetermine the amount of the equalization payment.[5] *See Eads v. Eads*, 114 N.E.3d 868, 877-878 (Ind. Ct. App. 2018) (noting that the husband would be responsible for taxes on the full amount of his pension where he would be receiving the distributions and paying the wife a portion of the distribution as part of a property settlement, citing Ind. Code § 31-15-7-7, and remanding for the trial court to address the tax consequences either by reducing the wife's percentage of the husband's pension payments to account for the fact the husband would be paying taxes on her portion or by determining the after-tax amount of the husband's pension payments and awarding the wife a portion

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[3] In *Maxwell I*, we affirmed the trial court's decision to utilize an immediate offset method to distribute the Lilly pension benefit through a property settlement judgment rather than a QDRO.

[4] In dividing the marital property, the trial court awarded Husband his Lilly and military pensions.

[5] The trial court may modify the pension valuation amounts in its marital balance sheet to account for tax consequences of the property disposition and then use the modified amounts to recalculate Husband's equalization payment.

of the net pension payment); *see also Hardin*, 964 N.E.2d at 252 (holding the trial court's order dividing the husband's pension resulted in a division of the marital estate which was far from the proportion the trial court intended and was not just and reasonable and remanding for recalculation); *Pulley*, 652 N.E.2d at 531 (concluding remand was required where the court ordered one party to pay certain taxes and noting "[w]ith a marital estate of this size, this amounts to a substantial deviation from the attempted 60/40 split").[6]

C. *Equalization Payment Plan*

[13] The trial court ordered Husband to make an equalization payment of $68,953.[7] It also ordered the amount was "payable at a rate of Five Hundred Dollars ($500.00) per month with interest at the rate of 8% per annum until paid in full."[8] Appellant's Appendix Volume II at 43. Husband argues that he "would

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[6] The dissent cites *Harlan v. Harlan*, which addressed the possible future tax liability associated with the sale of shares in a company. 544 N.E.2d 553, 555-556 (Ind. Ct. App. 1989), *aff'd*, 560 N.E.2d 1246 (Ind. 1990). In *In re Marriage of Mulvihill*, 471 N.E.2d 10 (Ind. Ct. App. 1984), we affirmed an order allowing for a deduction for taxes related to a husband's retirement plan, "noting that unless the husband died before retirement or before disability, the tax consequences were definite and not speculative." *Hartley v. Hartley*, 862 N.E.2d 274, 284 n.7 (Ind. Ct. App. 2007) (discussing *Mulvihill*, 471 N.E.2d at 14). More recently, in *Hartley*, the trial court utilized after-tax values of the parties' pensions in dividing the marital property, and we stated that Indiana case law supported the application of the after-tax values under the circumstances. *Id*. We further observed that, in *Harlan*, "this Court noted that the rationale in *Mulvihill* was consistent with the statute" and that the Indiana Supreme Court "did not disagree with this Court's stated acceptance of *Mulvihill*." *Id*. (citing *Harlan*, 544 N.E.2d at 555; *Harlan*, 560 N.E.2d at 1246). There is no question Husband will be responsible for the taxes on his pension benefits, the tax consequences are no less definite than the assumptions used to calculate the present values of the pensions, and the failure to account for the tax consequences significantly alters the court's intended 60/40 division.

[7] We anticipate the trial court will enter a modified equalization payment amount as discussed in Part B.

[8] Ind. Code § 24-4.6-1-101 provides that, except in certain circumstances, interest on judgments for money shall be an annual rate of eight percent.

be paying just under fifty dollars ($50) a month towards the principle [sic] balance" of the equalization payment which "circumvents the statutory mandate to divide marital property in a "just and reasonable manner." Appellant's Brief at 14. While Husband may pay a substantial amount in interest if he were to make monthly $500 payments, we note that Husband is free to pay off the judgment more quickly and thereby incur less in interest.

[14] For the foregoing reasons, we reverse in part and remand for entry of an amended order consistent with this decision.

[15] Reversed in part and remanded.

Pyle, J., concurs.

Vaidik, J., concurs in part and dissents in part.

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January 26, 2021

Court of Appeals Case No. 20A-DR-869

Vaidik, Judge, concurring in part and dissenting in part.

[16] I respectfully dissent from the majority's holding the trial court abused its discretion in not considering the tax consequences associated with Husband's Eli Lilly and military pensions. Because there were no immediate tax consequences from the court's disposition of the pensions and the amount of

future taxes is too speculative, I would affirm the trial court on this issue. I concur with the majority on the remaining issues.

[17] Indiana Code section 31-15-7-7 provides, "The court, in determining what is just and reasonable in dividing property under this chapter, shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party." This Court addressed the predecessor to Section 31-15-7-7 in *Harlan v. Harlan*, 544 N.E.2d 553 (Ind. Ct. App. 1989), *reh'g denied*, which our Supreme Court summarily affirmed, 560 N.E.2d 1246 (Ind. 1990). Specifically, we held the "thrust" of the statute "is to recognize that there may be in the plan of division of marital property certain tax consequences which should be taken into account. The clear inference is that **only** tax consequences necessarily arising from the plan of distribution are to be taken into account, not speculative possibilities." *Harlan*, 544 N.E.2d at 555. In other words, "[a] taxable event must occur as a direct result of a court-ordered disposition of the marital estate" for the tax consequences to be considered. *Granger v. Granger*, 579 N.E.2d 1319, 1321 (Ind. Ct. App. 1991), *trans. denied*; *see also Knotts v. Knotts*, 693 N.E.2d 962, 968 (Ind. Ct. App. 1998) ("Future tax consequences incident to the disposition of stock awarded one party are not a proper consideration[] before the trial court."), *trans. denied*; *DeHaan v. DeHaan*, 572 N.E.2d 1315, 1327 (Ind. Ct. App. 1991) (holding "only the immediate tax consequences of the property disposition may be considered"), *reh'g denied*, *trans. denied*.

[18] For example, in *Granger*, we held "the trial court erred in reducing the marital estate by $53,200.00, the amount the trial court considered as the anticipated tax liability from the possible and future sale of the laundromats, because the laundromats were not ordered sold by the trial court in the property disposition." 579 N.E.2d at 1321. Likewise, in *Harlan*, we held the trial court erred in subtracting from the value of HSD—a company in which the husband had a three-fourths ownership—the tax liability that would be incurred if the husband sold all his shares because the shares were not ordered sold as part of the divorce. 544 N.E.2d at 555-56. Rather, the husband was ordered to make monthly payments to the wife.

[19] I acknowledge there are good reasons to consider the tax consequences of a pension where a spouse is required to make an immediate-offset payment to the other spouse.[9] One such reason is the spouse receiving the pension will inevitably pay taxes on it. There are also good reasons not to consider the tax consequences where determining the amount of future taxes would require conjecture. However, I believe our Supreme Court's summary affirmance of *Harlan* resolved this issue years ago. *See* 14 J. Eric Smithburn, Indiana Practice,

[9] Trial courts use several methods for distributing pension benefits, including an immediate-offset method, a deferred-distribution method, or a variation or combination of these methods. *Kendrick v. Kendrick*, 44 N.E.3d 721, 726 (Ind. Ct. App. 2015), *trans. denied*. Under the immediate-offset method, the court determines the present value of the retirement benefits and awards the non-owning spouse his or her share of the benefits in an immediate lump-sum award of cash or property equal to the value of his or her interest. *Id.* Under the deferred-distribution method, the court makes no immediate division of the retirement benefits but determines the future benefits to which the non-owning spouse is entitled. *Id.*

Family Law § 10:36 (Nov. 2020 update) (observing *Harlan* resolved a split of authority).

[20] Here, the trial court valued Husband's Eli Lilly pension at $174,148, awarded the pension to Husband, and ordered Husband to pay a property-settlement judgment of $68,953 to Wife. Husband, forty-eight years old at the time of remand and younger at the time of divorce, has no idea what the taxes will be when he receives his Eli Lilly pension at age sixty-two or sixty-five. *See* Tr. p. 37. Nor could he. Nevertheless, he wants the court to reduce the value of his pension by 25% to account for taxes. But as Husband himself admits, the taxes more than ten years from now are certainly not immediate and are also unknown.[10] As we said in *Harlan*, "Under these circumstances there is no ominous specter of an IRS agent lurking in the shadows waiting to pounce on this plan of distribution." 544 N.E.2d at 556. For these reasons, I would affirm the trial court on this issue.

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[10] Husband's military pension did not accept a QDRO since he and Wife were not married for ten years during his military service. *See Maxwell v. Maxwell*, No. 30A01-1712-DR-2768 (Ind. Ct. App. Aug. 10, 2018). With a QDRO, each party is required to pay taxes on the amount they individually receive. In support of its holding the trial court erred in not considering the tax consequences of Husband's military pension, the majority cites *Eads v. Eads*, 114 N.E.3d 868 (Ind. Ct. App. 2018), which involved a deferred distribution of the husband's pension where his employer did not accept a QDRO. In that case, it was unclear if the husband had already retired or was soon to be retired. We therefore held the trial court could consider the tax consequences by reducing the wife's percentage of the husband's monthly pension payment or by using the after-tax amount of the husband's monthly pension payment. *See id.* at 877-78. Because of the immediacy of the pension distribution in *Eads*, the tax consequences were not uncertain. But in this case, Husband won't receive his military pension for at least a decade from now. *See* Tr. p. 37 (Husband acknowledging he won't be eligible to receive his military pension until he is sixty years old). Accordingly, I believe the trial court did not abuse its discretion in not considering the tax consequences of Husband's military pension.