

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sue Thompson,
Appellant-Petitioner,

v.

Kent W. Thompson,
Appellee-Plaintiff.

July 13, 2023

Court of Appeals Case No.
22A-DN-1927

Appeal from the Boone Superior
Court

The Honorable Matthew C.
Kincaid, Judge

Trial Court Cause No.
06D01-2003-DN-399

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

- [1] Sue Thompson (Wife) appeals the trial court’s decree dissolving her marriage to Kent W. Thompson (Husband), claiming that it was error to not “charge” Husband with monthly pension payments he received during the pendency of the dissolution proceedings. *Appellant’s Brief* at 9. Wife further contends that the trial court abused its discretion in ordering her to pay a portion of the capital gains taxes should Husband sell the marital residence that was awarded to him.
- [2] Husband cross-appeals, claiming that the trial court’s ruling on Wife’s motion to correct error was erroneous because the trial court did not rule on that motion in a timely fashion. In the alternative, Husband contends that the trial court abused its discretion in the order on the motion to correct error by ordering him to make a \$59,521 equalization payment to Wife because it relied on an incorrect balance sheet that Wife had submitted with her motion.
- [3] We affirm in part, reverse in part, and remand this cause for further proceedings consistent with this opinion so that the trial court may issue an amended dissolution decree that reflects an equal division of the marital estate between the parties.

Facts and Procedural History

- [4] The parties were married on February 2, 1980, and on March 21, 2020, Wife filed a petition to dissolve the marriage. During the marriage, each party

accumulated pensions and retirement accounts. Husband's pension (the Lilly pension) was through Eli Lilly & Company, and he retired from that company shortly before Wife filed the petition for dissolution. The Lilly pension was valued at \$870,139.45 as of the date of the petition for dissolution. The parties stipulated to that valuation, and Husband began receiving \$3786.31 per month from the Lilly pension immediately after the petition for dissolution was filed. From the date of the dissolution petition through the date of the final hearing, Husband received a total of \$87,085.13 from the Lilly pension.

[5] At the final hearing on January 27, 2022, the parties stipulated to the value of most of the remaining marital assets. Thereafter, on March 1, 2022, Wife filed a motion to reopen the evidence, alleging that newly discovered evidence revealed that Husband had withdrawn \$2500 from a previously undisclosed KST Asset Protection Trust Account (Trust account) on April 8, 2020. Wife alleged that Husband deposited those funds into his personal account and used that money to pay his attorney in the dissolution matter. Thus, Wife claimed that Husband should be charged with that amount when dividing the marital estate. Prior to ruling on that motion, however, the trial court entered the decree of dissolution on March 21, 2022, and incorporated the parties' stipulated values of the assets. The dissolution decree¹ provided in part as follows:

¹ The trial court adopted Husband's proposed "Debt/Asset worksheet" in the final decree. *See Appellant's Appendix Vol. II* at 24.

VI. Property Rights Division. The property rights of the parties shall be divided as follows:

1. Marital Residence. *Husband shall have exclusive possession of the marital residence. Husband shall refinance the mortgage and the HELOC on the marital residence, removing Wife's name therefrom, within one (1) year of the date of this Order. At the closing of the refinancing, Husband shall pay Wife the sum of \$187,858.06. If Husband elects to sell the property rather than refinance, Wife shall receive the same sum less any capital gains tax to which Husband is subjected. Wife's percentage of the capital gains tax shall be equal to the percentage of the net profit from the sale of the marital residence that is represented by the sum of \$187,858.06. Wife shall transfer her interest in the marital residence to Husband by quitclaim deed to be prepared by Husband's attorney in time for Husband to refinance the mortgage and the HELOC on the marital residence. Husband shall be solely responsible for the mortgage, HELOC, taxes and insurance on the marital residence and shall hold Wife harmless and indemnify her thereon until it is refinanced.*

...

E. Husband's State Bank of Lizton Checking Account

Husband's Exhibit Y contained a statement on this account dated April 9, 2020, which shows daily balance information. On March 20, 2020, this account had a balance of \$2015.38. The Court now adopts this value and designates this account as a marital asset.

...

K. 2019 Taxes

Half of the cost of tax preparation, \$175 shall also be applied as a credit against Wife's share of the marital estate.

Appellant's Appendix Vol. 2 at 16, 18, 22. (emphasis added).

- [6] The decree further provided that Husband was solely responsible for the remaining \$62,613.46 due on the mortgage, and that Wife was to be awarded 46% (or \$400,264.15) of the Lilly pension. In the end, the trial court awarded each party \$1,062,968.92 of the marital estate. The decree did not reference or account for the distributions that Husband received from the Lilly pension during the pendency of the proceedings.
- [7] On April 19, 2022, Wife filed a motion to correct error, claiming that because Husband's pension was valued as of the filing date of the petition for dissolution and he had received distributions in the amount of \$87,085.13 during the pendency of the action, the trial court should have "charged" that amount against Husband's share of the marital estate. Wife also alleged that the trial court erred in ordering her to pay a portion of capital gains taxes if Husband decided to sell the residence rather than refinance. She alleged that because Husband had no immediate plans to sell the house, any tax consequences from a sale of the residence in the future were speculative and should not have been considered and assigned to her in the final decree.
- [8] Wife further pointed out that the parties had previously discussed the existence of the Trust account with the trial court in chambers after she had filed the motion to reopen the evidence. The trust statements—which were subsequently provided to the court—in fact established that Husband withdrew \$2500 from

the Trust account on April 8, 2020, deposited those funds into his personal account and used those funds to pay his legal counsel. Thus, Wife reasserted in her motion to correct error that the \$2500 should be charged against Husband's share of the marital estate.

[9] Wife also alleged in the motion to correct error that she was erroneously charged twice under the final decree for half of the parties' \$350 tax preparation fee that they incurred in 2019, and that the trial court's "hand-corrected" balance of a Bank of Lizton checking account from \$2215.38 to \$2015.38 in the final decree was erroneous because the exhibit Husband submitted along with his proposed decree reflected a \$2215.38 account balance.

[10] Finally, Wife claimed that the trial court erred in awarding Husband more than fifty percent of the marital estate without any justification for doing so.² Wife pointed out that the trial court never stated that it would vary from the "50/50 presumption," and it stated no reason for doing so. *Appellant's Appendix Vol. II* at 40.

[11] Following a combined hearing on the motion to correct error and on Wife's motion to reopen the evidence that was conducted on June 13, 2022, the trial court issued an "order reopening evidence and correcting/amending decree of

² Wife's Exhibit A that she submitted with the motion to correct error reported that she was awarded only 44.56% of the marital estate, whereas Husband was awarded 55.44% of the marital estate. In arriving at that result, Wife alleged that the total amount of the marital estate was \$2,055,786. Wife's exhibit took into account the pension benefits that Husband received during the pendency of the proceedings that she claimed should have been charged to him.

dissolution” on July 26, 2022, granting Wife’s motion to correct error in part and denying it in part. More particularly, the trial court concluded that it intended a “50/50 disposition” of the marital estate but noted that the final decree did not provide for such. Thus, the trial court ordered Husband to make an equalization payment of \$59,521 to Wife that would reflect an even split of the total marital estate. The trial court determined that such a payment “accounts for the other adjustments in the balance sheet.” *Appellant’s Appendix Vol. II* at 49.

[12] In its order, the trial court agreed that the Trust account should have been included in the marital estate and it charged \$2500 to Husband in light of his withdrawal from that account. Additionally, while the original decree awarded the marital residence to husband and held him solely responsible for all the debt on the home, the balance sheet that was attached to the July 26, 2022 order erroneously indicated that the mortgage debt was evenly divided between the parties.

[13] The trial court rejected Wife’s claims that it erred in not charging Husband for the pension payments he received during the pendency of the divorce proceedings and concluded that capital gains taxes were properly assigned to Wife, should Husband decide to sell the residence.

[14] The trial court agreed that Wife was erroneously charged an additional \$175 for preparation of the parties’ 2019 tax returns and ordered that amount stricken from the final decree. It further determined that Wife’s motion to correct error

properly asserted that the balance of the parties' Bank of Lizton checking account was \$2215.38 rather than \$2015.38. Thus, the trial court corrected the amount in the final decree.

[15] In sum, the balance sheet reflected a net marital estate of \$2,150,610 divided equally by the parties. That amount included the \$59,521 equalization payment that Husband was to pay Wife.

[16] Wife now appeals, and Husband cross-appeals.

Discussion and Decision

I. Standard of Review

[17] An abuse-of-discretion standard of review applies to a trial court's division of marital assets. *Roetter v. Roetter*, 182 N.E.3d 221, 225 (Ind. 2022). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts or reasonable inferences, if it misinterprets the law, or if it overlooks evidence of applicable statutory factors. *Mitchell v. Mitchell*, 875 N.E.2d 320, 323 (Ind. Ct. App. 2007), *trans. denied*

[18] When, as here, the trial court enters findings of fact and conclusions of law, we may set aside the trial court's judgment only when "clearly erroneous." *Roetter*, 182 N.E.3d at 225. The party challenging the trial court's division of marital property must overcome a strong presumption that the court considered and complied with the applicable statute. *Id.*

II. Wife's Contentions

A. Husband's Pension

- [19] Wife argues that the decree must be set aside because the trial court did not charge Husband with the \$87,085.13 in pension benefits he received during the pendency of the dissolution proceedings. More particularly, Wife maintains that because Husband's pension was an asset of the marriage, his share of the pension should be reduced by the amount of the monthly benefits he received. Thus, Wife claims that the trial court effectively varied from the "50/50 division of marital property without any justification." *Appellant's Brief* at 9.
- [20] We note that the trial court has the discretion to divide pension and retirement plans in a just and reasonable manner, which includes setting aside to either party a percentage of payments either by assignment or in kind at the time of receipt. *See* Ind. Code § 31-15-7-4. And the trial court may use any date between the final separation and the date of dissolution as the valuation date. *Eyler v. Eyler*, 492 N.E.2d 1071, 1074 (Ind.1986), *trans. dismissed*.
- [21] Here, it is undisputed that the Lilly pension was valued at the time of the filing of the petition, and Wife was awarded forty-six percent of that pension in the final decree. Husband's withdrawal of benefits did not affect the sum of the pension, which was fixed. There is no evidence to support Wife's claim that the stipulated value of the Lilly pension was reduced by the amount of Husband's regular monthly distributions. Under the decree, the percentage of the Lilly pension that was awarded to Wife remains the same, regardless of the monthly

distributions that Husband took during the pendency of the proceedings. Therefore, we cannot say that the trial court abused its discretion in not “charging” Husband with the monthly pension distributions he received against his share of the marital estate.

II. Capital Gains Taxes

[22] Wife argues that the trial court abused its discretion in ordering her to pay a share of capital gains taxes if Husband opted to sell the marital residence. Wife maintains that because the final decree did not specifically order Husband to sell the house, capital gains taxes were merely speculative and should not have been considered when dividing the marital estate. Thus, Wife asserts that ordering her to pay a portion of the capital gains taxes that Husband might incur if he chooses to sell the residence is clearly erroneous.

[23] In determining what is just and reasonable in dividing the marital property, the trial court “shall consider the tax consequence of the property disposition with respect to the present and future economic circumstances of each party.” Ind. Code § 31-15-7-7. The trial court, however, is required to consider “*only* the direct or inherent and necessarily incurred tax consequences of the property disposition.” *Harlan v. Harlan*, 560 N.E.2d 1246 (Ind. 1990) (emphasis added). A taxable event must occur as a direct result of the court ordered disposition of the marital estate for the resulting tax to reduce the value of the marital estate. *Granger v. Granger*, 579 N.E.2d 1319, 1321 (Ind. Ct. App. 1991), *trans. denied*. The inclusion of costs of the sale of real estate in a trial court’s valuation of said

real estate has been analogized by this court to the consideration of tax consequences under I.C. § 31-15-7-7. *Dowden v. Dowden*, 696 N.E.2d 456, 458n. 1 (Ind. Ct. App. 1998). Potential tax consequences of a future disposition of property are speculative in nature and should not be considered by the trial court in making the property distribution. *Qazi v. Qazi*, 546 N.E.2d 866, 871 (Ind. Ct. App. 1989), *trans. denied*.

[24] In this case, Wife argued at the January 27, 2022 final hearing that Husband should be ordered to either sell the residence so she could use her anticipated proceeds from the sale to obtain new housing, or refinance the home within ninety days. Husband testified that he was not sure whether he could afford to refinance the house. In light of this testimony, while the trial court ordered Husband to refinance under the decree, it contemplated the option to sell if Husband was not able to obtain a loan and refinance. In other words, the final decree ordered Husband to refinance within one year, yet an alternative plan of distribution was contemplated. If Husband is unable to refinance and is compelled to sell the house, there will certainly be sale-related costs and capital gains taxes. Thus, in these circumstances, it was proper for the trial court to consider Wife's portion of capital gains tax responsibility, as those taxes are a "direct or inherent and necessarily incurred tax" of the disposition of the home, which will occur should Husband not be able to refinance as ordered and, instead, sell the residence. *See Smith v. Smith*, 136 N.E.3d 275, 284 (Ind. Ct. App. 2019). As a result, we cannot say that the sale of the house was too speculative to include the associated tax consequences in the order, and the trial

court did not abuse its discretion by allocating a portion of capital gains tax consequences to Wife, should Husband be compelled to sell the residence.

III. Cross Appeal

- [25] On cross-appeal, Husband argues that the trial court abused its discretion in granting a portion of Wife's motion to correct error. Husband contends that because the trial court did not rule on the motion to correct error in a timely manner, Wife's motion was deemed denied and the order on the motion to correct error granting her relief is a nullity.
- [26] Pursuant to Ind. Trial Rule 53.3(A), the trial court must rule on a motion to correct error no more than thirty days after the motion is heard. And T.R. 53.1(C) provides in part that the trial court is deemed to have ruled on a motion to correct error on the date that the ruling is noted in the Chronological Case Summary (CCS). *See Kovacik v. Kovacik*, 631 N.E.2d 509, 511 (Ind. Ct. App. 1994).
- [27] In this case, Wife filed her motion to correct error on April 19, 2022, and the trial court conducted a hearing on the motion on June 13, 2022. The only entry made by the trial court on the motion to correct error was on July 26, 2022, and no findings were made in the CCS prior to that date. As a result, the trial court's order on the motion finding that Wife should prevail on the tax preparation fee and the \$200 State Bank of Lizton checking account balance is without merit because the order granting relief was untimely and is deemed denied.

[28] For these same reasons, the trial court’s order directing Husband to make an equalization payment of \$59,521 to Wife is a nullity because the ruling was not timely. Moreover, in ordering Husband to make this payment, the trial court erroneously determined that Wife was responsible for one-half of the remaining mortgage amount, i.e., \$31,307. To be sure, the final decree granted Husband the “exclusive possession of the marital residence . . . [with the sole responsibility] for the mortgage. . . .” *Appellant’s Appendix Vol. 2* at 18. For all these reasons, the trial court’s order directing Husband to make an equalization payment to Wife cannot stand.

[29] As for the \$2500 that Husband withdrew from the newly discovered Trust account to pay personal expenses, we agree with Wife’s contention that she originally raised this issue in her motion to reopen the evidence. That is, Wife only reasserted her contention in the subsequent motion to correct error. In determining that the \$2500 Husband withdrew from the Trust account should be charged to him, the order provided:

[p]aragraph 8 of Wife’s Motion to Correct Error *which duplicates Wife’s motion to Reopen is meritorious*. The evidence was reopened by order of the Court on the record on June 13, 2022 to address newly discovered evidence of a certain asset. There is a KST Asset Protection Trust Account with a value of \$2,500.00 which should have been and is now included in the marital estate and which is charged to Husband. *That Motion is GRANTED attached hereto is a corrected marital balance sheet as Exhibit A*. The DECREE is amended to reflect the inclusion of this asset and its set off to Husband.

Appellant's Appendix Vol. 2 at 49. We conclude that the trial court correctly determined in its order on the motion to reopen the evidence that the Trust account should have been included in the marital estate and that Husband should have been charged with the \$2500 he spent from that account.

Conclusion

[30] In light of our discussion above, we conclude that the trial court properly refused to charge Husband with the amount of the monthly Lilly pension benefits he received during the pendency of the dissolution proceedings, and that it was proper in these circumstances to consider the capital gains taxes and charge Wife with a portion of those taxes if Husband sells the residence. We likewise conclude that the trial court correctly determined that the \$2500 Husband withdrew from the Trust account should be charged against his interest in the marital estate.

[31] We further conclude that because the trial court did not rule on Wife's motion to correct error in a timely fashion, she does not prevail on her claims that she was charged twice for the tax preparation fees and was entitled to a correction of the amount in the parties' Bank of Lizton checking account. Finally, we conclude that the trial court erred in ordering Husband to make a \$59,521 equalization payment to Wife.

[32] Affirmed in part, reversed in part, and remanded.

Riley, J. and Pyle, J., concur.