MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Marriage of

Robert M. Rairdon,

Appellant/Cross-Appellee-Respondent,

v.

Stacy Rairdon,

Appellee/Cross-Appellant-Petitioner.

May 3, 2023

Court of Appeals Case No. 22A-DN-976

Appeal from the Boone Circuit Court

The Honorable Lori N. Schein, Judge

Trial Court Cause No. 06C01-1904-DN-568

Memorandum Decision by Judge Foley
Judges Vaidik and Tavitas concur.

Foley, Judge.

[1] Robert M. Rairdon ("Rairdon") appeals the trial court's decision not to apply the coverture fraction formula to the division of his pension upon the dissolution of his marriage to Stacy Rairdon ("Reagan").[1] On cross-appeal, Reagan argues that the trial court abused its discretion when it denied her request for attorney's fees. We reject both claims, and, accordingly, affirm.

Facts and Procedural History

[2] The parties were married on March 31, 2009, and separated on the date of the filing of Reagan's petition for dissolution of marriage: April 12, 2019. Reagan filed her petition for dissolution of marriage after Rairdon "was criminally charged and later convicted of criminal acts against his step-daughter, [Reagan's] child." Appellant's App. Vol. II p. 24. The parties entered into a bifurcated settlement agreement which divided all of the marital assets except Rairdon's pension. The agreement awarded 52% of the net marital estate (excepting the pension) to Reagan and 48% to Rairdon. Rairdon's pension is a defined benefit pension annuity which had a cash value of $461,260.85 as of the date the petition for dissolution was filed. Rairdon retired on January 31, 2019, and thereafter began receiving a monthly benefit from the pension in the amount of $2,055.07. The division of the pension was a decision left to the trial court, which accepted the settlement agreement and then conducted a hearing on March 29, 2022.

[1] For clarity's sake, we refer to the Appellee throughout by her maiden name: Reagan.

[3] The parties jointly hired Dan Andrews ("Andrews"), who is, among other things, a certified public accountant. Andrews calculated the value[2] of the pension and then applied what is known as the coverture fraction formula to determine the value of the portion of the pension accrued during the marriage. The formula utilizes a fraction in which the numerator equals the duration of the marriage, and the denominator equals the total period of time that the pension accrued benefits. Andrews calculated the coverture fraction to be 27.47%, which equates to $126,708.36. This represents the value of the pension that accrued during the marriage ($461,260.85 x. 0.2747 = $126,708.36). Rairdon asked the trial court to apply the coverture fraction formula and then divide the resulting amount equally among the parties, thereby excluding the remaining balance of the pension from the distribution of the marital estate. Reagan sought a division of the *entire* value of the pension, or, in the alternative, 100% of the amount resulting from application of the coverture fraction formula.

[4] Of note at the hearing, Reagan testified that: (1) Rairdon had dissipated marital assets for purposes of paying his attorney in the criminal matter involving her daughter; (2) the criminal matter had caused Reagan to miss time at work; and

[2] According to his report, Andrews calculated, based on Rairdon's $2,216.74 per month fixed annuity, and starting at age 59.39 and continuing for life thereafter (5-year certain), that the gross value of the pension was $461,260.85, as of the date of the divorce filing. The parties stipulated to the admissibility of Andrews's calculations.

(3) both Reagan and her daughter were compelled to seek counselling as a result of the impact of Rairdon's criminal conduct on them.

[5] On April 12, 2022, the trial court issued its order along with its findings of fact. The trial court concluded that the entire value of the pension should rightfully be considered a part of the marital estate and was subject to the presumptive equal division. Thus, the trial court concluded that the coverture fraction formula would not be applied. Finally, the trial court denied Reagan's request for attorney's fees. This appeal followed.

Discussion and Decision

I. Division of Rairdon's Pension

[6] Rairdon raises a single issue, contending that the trial court clearly erred when it concluded that Rairdon failed to shoulder his burden to overcome the presumption of equal division of marital assets. The trial court's findings of fact and conclusions thereon were entered pursuant to Indiana Trial Rule 52(A), which "prohibits a reviewing court on appeal from setting aside the trial court's judgment 'unless clearly erroneous.'" *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). We are required to give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* "When a trial court has made special findings of fact, as it did in this case, its judgment is clearly erroneous only if (i) its findings of fact do not support its conclusions of law or (ii) its conclusions of law do not support its judgment." *Id.* (citing *Estate of Reasor v. Putnam Cnty.*, 635 N.E.2d 153, 158 (Ind. 1994)). "Findings are clearly

erroneous only when the record contains no facts to support them either directly or by inference." *Id.*

[7] "The party challenging the trial court's property division bears the burden of proof." *Smith v. Smith*, 854 N.E.2d 1, 5 (Ind. Ct. App. 2006). "That party must overcome a strong presumption that the court complied with the statute and considered the evidence on each of the statutory factors." *Id.* "The presumption that a dissolution court correctly followed the law and made all the proper considerations when dividing the property is one of the strongest presumptions applicable to our consideration on appeal." *Id.* "Thus, we will reverse a property distribution only if there is no rational basis for the award." *Id.*

[8] "It is well settled that in a dissolution action, all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts." *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014), *trans denied*. Specifically, Indiana Code Section 31-15-7-4(a) provides:

> (a) In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties, whether:
>
> (1) owned by either spouse before the marriage;
>
> (2) acquired by either spouse in his or her own right:

(A) after the marriage; and

(B) before final separation of the parties; or

(3) acquired by their joint efforts.

For purposes of dissolution, property means "all the assets of either party or both parties." Ind. Code § 31-9-2-98.

[9] "'The requirement that all marital assets be placed in the marital pot is meant to insure that the trial court first determines that value before endeavoring to divide property.'" *Falatovics*, 15 N.E.3d at 110 (quoting *Montgomery v. Faust*, 910 N.E.2d 234, 238 (Ind. Ct. App. 2009)). "'Indiana's 'one pot' theory prohibits the exclusion of any asset in which a party has a vested interest from the scope of the trial court's power to divide and award.'" *Id.* (quoting *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008)). "[T]he determinative date when identifying marital property subject to division is the date of final separation, in other words, the date the petition for dissolution was filed." *Webb v. Schleutker*, 891 N.E.2d 1144, 1149 (Ind. Ct. App. 2008); *see also Smith*, 854 N.E.2d at 6 ("The marital pot generally closes on the date the dissolution petition is filed.").

[10] Pursuant to Indiana Code Section 31-15-7-4(b), the trial court "shall divide the property in a just and reasonable manner . . . ." We "presume that an equal division of the marital property between the parties is just and reasonable." I.C. § 31-15-7-5.

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.

Id.

[11] In general, "[w]hile the trial court may decide to award a particular asset solely to one spouse as part of its just and reasonable property division, it must first include the asset in its consideration of the marital estate to be divided." *Falatovics*, 15 N.E.3d at 110. "The systematic exclusion of any marital asset from the marital pot is erroneous." *Id.*

[12] Specifically, Rairdon argues that the trial court erred by opting not to apply the coverture fraction formula to the pension.

> The "coverture fraction" formula is one method a trial court may use to distribute pension or retirement plan benefits to the earning and non-earning spouses. Under this methodology, the value of the retirement plan is multiplied by a fraction, the numerator of which is the period of time during which the marriage existed (while pension rights were accruing) and the denominator is the total period of time during which pension rights accrued.

Morey v. Morey, 49 N.E.3d 1065, 1071 (Ind. Ct. App. 2016) (quoting *In re Marriage of Fisher*, 24 N.E.3d 429, 433 (Ind. Ct. App. 2014)). "In Indiana, trial courts have historically exercised their discretion to apply the coverture fraction formula when allocating and distributing pension and retirement benefits in dissolution of marriage proceedings, but that discretion has been inconsistently applied." *Id.* "[T]he coverture fraction formula operates to segregate a percentage of a given asset from the marital pot while including the balance of the asset in the marital pot." *Id.* Because Rairdon sought to segregate an asset from the marital estate, he carried the burden to demonstrate which portion of

his pension accrued prior to the marriage, which he did via undisputed expert evaluation in the form of a written report.

[13] The trial court recognized that Rairdon contributed to his pension for twenty-six years prior to his nearly ten-year marriage to Reagan. However, the trial court also considered the dissipation of marital assets caused by Rairdon's criminal behavior. Reagan and her daughter incurred costs for mental health counseling, which will continue in the future, and Rairdon incurred considerable attorney's fees. As noted above, we strongly presume that the trial court entertained all considerations pertinent to the statutory factors and the overall distribution determination.

[14] Application of the coverture fraction formula is an option a trial court can utilize, but it is not required. Here, the trial court declined to apply the coverture fraction formula to remove that portion of Rairdon's pension earned prior to the marriage from the marital estate, but then weighed that factor against the dissipation of property caused by Rairdon's criminal acts to reach its conclusion that an equal division of the marital estate was just and reasonable. On balance we are unable to conclude that the trial court's conclusions were wholly lacking in any rational basis, as our standard of review demands.

II. Cross-Appeal

[15] Our analysis, however, is not concluded. In her brief, Reagan raises a second issue: whether the trial court erred when it denied her motion for attorney's fees. First, we note that Rairdon failed to file a reply brief. "[F]ailure to

respond to an issue raised in an [opposing party's] brief is akin to failing to file a brief as to that issue." *Elliott v. Rush Mem'l Hosp.*, 928 N.E.2d 634, 639 (Ind. Ct. App. 2010) (citing *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 837 (Ind. Ct. App. 2005), *trans. denied*) *trans denied*.[3] "'Although this failure does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required, counsel for the [cross-]appellee remains responsible for controverting arguments raised by the [cross-]appellant.'" *Id*. For us to reverse, Reagan must establish only that the trial court committed prima facie error. "Prima facie means at first sight, on first appearance, or on the face of it." *Id*. (internal quotations omitted).

[16] "'We review a trial court's award of attorney's fees for an abuse of discretion.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1102 (Ind. Ct. App. 2021) (quoting *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020). "'An abuse of discretion occurs when the court's decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law.'" *Id*. "'To make this determination, we review any findings of fact for clear error and any legal conclusions de novo.'" *Id*.

[17] "Generally, Indiana has consistently followed the American Rule in which both parties generally pay their own fees. In the absence of statutory authority or an agreement between the parties to the contrary—or an equitable exception—a

[3] The language is slightly ill-fitting, given that this issue most commonly occurs when an Appellee fails to address an argument raised in an Appellant's opening brief.

prevailing party has no right to recover attorney fees from the opposition." *Id*. (quoting *BioConvergence, LLC v. Menefee*, 103 N.E.3d 1141, 1160 (Ind. Ct. App. 2018), *trans. denied*). The party seeking fees carries a "hefty" burden to demonstrate that an exception to the American Rule is warranted. *Id*.

[18] Reagan relies on one of the well-established exceptions to the American Rule: Indiana Code Section 31-15-10-1. The statute provides, in relevant part, that "[t]he court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding . . ." stemming from a dissolution of marriage, including "attorney's fees." I.C. § 31-15-10-1(a).

> In determining whether to award attorney's fees in a dissolution proceeding, trial courts should consider the parties' resources, their economic condition, their ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award. A party's misconduct that directly results in additional litigation expenses may also be considered. Consideration of these factors promotes the legislative purpose behind the award of attorney's fees, which is to ensure that a party who would not otherwise be able to afford an attorney is able to retain representation. When one party is in a superior position to pay fees over the other party, an award is proper.

Haggarty v. Haggarty, 176 N.E.3d 234, 251 (Ind. Ct. App. 2021) (quoting *Eads v. Eads*, 114 N.E.3d 868, 879 (Ind. Ct. App. 2018)).

[19] While the bifurcated settlement agreement provided that each party pay its own attorney's fees, Reagan seeks additional fees for the litigation associated with

the division of the pension. Reagan notes that the pension hearing was continued several times due to Rairdon's incarceration. But there is nothing in the record to suggest that Rairdon was intentionally delaying the proceedings or pursuing any baseless claims. Neither does Reagan make any arguments with respect to the factors enumerated above. Given that an attorney's fee determination such as this is left to the "'broad discretion'" of the trial court, we cannot say on the face of this record that the trial court plainly abused its discretion in denying Reagan's request. *Haggarty*, 176 N.E.3d at 251 (quoting *Eads*, 114 N.E.3d at 879.

[20] Affirmed.

Vaidik, J., and Tavitas, J., concur.