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IN THE
COURT OF APPEALS OF INDIANA

Tabetha Smith,
Appellant-Respondent,

v.

Shawn Smith,
Appellee-Petitioner.

August 9, 2022

Court of Appeals Case No.

21A-DC-2820

Appeal from the Marion Superior
Court

The Honorable Marshelle Dawkins
Broadwell, Judge

Trial Court Cause No.
49D16-2007-DC-23987

Tavitas, Judge.

Case Summary

- [1] Tabetha Smith (“Wife”) appeals the trial court’s division of property in her dissolution of marriage from Shawn Smith (“Husband”). Wife argues that the trial court abused its discretion when it divided the marital assets, especially Husband’s Indiana Public Retirement System pension (“INPRS Pension”), and

considered the tax consequences of the distribution. The problems with valuing pensions are numerous. The factors here are complicated by the inability to divide the INPRS Pension by a qualified domestic relations order (“QDRO”) and the fact that Husband’s retirement date is unknown. The best a trial court can do under these circumstances is what the trial court did here—rely on the only expert opinion regarding the value of Husband’s pension. Accordingly, we conclude that the trial court’s valuation, method of distribution, and consideration of the tax consequences were well within the trial court’s discretion. We part ways, however, with the trial court’s denial of Wife’s request for protection of her portion of the INPRS Pension benefits in the event of Husband’s death. We reverse in part and remand for the trial court to address this issue. Accordingly, we affirm in part, reverse in part, and remand.

Issues

- [2] Wife raises three issues, which we consolidate and restate as:
- I. Whether the trial court abused its discretion when dividing the marital estate, especially the INPRS Pension.
 - II. Whether the trial court abused its discretion by considering the tax impact on Husband’s payment of his INPRS Pension to Wife.

Facts

- [3] Husband and Wife were married in 1992 and had three children—two of whom are emancipated, and one of whom is in college. Husband was employed as a teacher for one and one-half years before the marriage and throughout the

marriage, eventually becoming a superintendent. Wife has a master's degree in Business Administration. Husband and Wife separated in 2016, and Husband filed a petition for dissolution of marriage on July 20, 2020.

[4] Husband participated in the INPRS Pension throughout his employment. The parties stipulated regarding child issues and the values of assets, debts, and the distribution of assets with the exception of Husband's INPRS Pension. This appeal concerns only the distribution of Husband's INPRS Pension, which is the marital estate's largest asset.

[5] At hearings in May and August 2021, Husband presented evidence concerning the present value of his INPRS Pension. Husband's INPRS Pension cannot be divided by a court order and is, thus, not subject to a QDRO. Husband could be ordered to pay a portion of his monthly benefit to Wife rather than Wife receiving a portion of the monthly benefit directly from the pension.¹ To retire with full, unreduced benefits, Husband must meet the "Rule of 85," which "states that when years of service and the age of the participant equal eighty-five (85), the participant can receive an unreduced benefit at [the] age of fifty-five (55)." Tr. Vol. II p. 79. At the time of filing of the petition for dissolution, Husband was fifty-two years old. Although Husband could receive full pension

¹ In general, "when a deferred-distribution award is implemented through a QDRO, the plan administrator gives a separate benefit check to each spouse, and each spouse is responsible for his or her own tax consequences." *Eads v. Eads*, 114 N.E.3d 868, 878 (Ind. Ct. App. 2018); see *Kendrick v. Kendrick*, 44 N.E.3d 721, 725-26 (Ind. Ct. App. 2015) (explaining in detail why PERF benefits are not subject to a QDRO), *trans. denied*.

benefits starting at age fifty-five, Husband testified that he has no current plans to retire soon and cannot do so due to his significant debts.

[6] Dan Andrews, an expert on pension valuations hired by Husband, provided valuations of Husband’s pension on the date of filing based upon three payout age options: (1) Husband’s age at the time of filing of the petition for dissolution, which would be an early retirement with reduced benefits; (2) the age of fifty-five based upon the Rule of Eighty-Five; and (3) the age of sixty-two. Andrews also calculated a coverture fraction of 95.24%.² Andrews calculated the following pre-taxed values of Husband’s pension:

**I. PRESENT VALUE OF DEFINED BENEFIT PENSION
ANNUITY:**

Age 53 Early Reduced

Present Value of Pension of \$4,134.26 per month fixed annuity
starting at age 53.05 and continuing for life thereafter (5 Year
Guarantee) . . . \$1,142,968.29

Earned during the marriage \$1,088,563.00 (95.24% of
\$1,142,968.29)

² “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.” *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)). “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.” *Id.* (quoting *Fisher*, 24 N.E.3d at 433).

Age 55 Rule of 85

Present Value of Pension of \$7,007.21 per month fixed annuity starting at age 55.05 and continuing for life thereafter (5 Year Guarantee) . . . \$1,766,837.56

Earned during the marriage . . . \$1,682,837.56 (95.24% of \$1,766,837.56)

Age 62 Intended Retirement Age

Present Value of Pension of \$7,007.21 per month fixed annuity starting at age 62.05 and continuing for life thereafter (5 Year Guarantee) . . . \$1,249,395.77

Earned during the marriage . . . \$1,189,924.53 (95.24% of \$1,249,395.77)

Appellee's App. Vol. II p. 5.

- [7] Samuel Pollom, a CPA with BGBC Partners hired by Husband, testified regarding the tax consequences of Husband's INPRS Pension. Pollom testified that "if the Court doesn't consider the tax consequence, [Husband is] paying tax

on [Wife's] benefit.” Tr. Vol. II p. 104. Pollom estimated the marginal and effective tax rates³ for the various payout age options:

Date	Effective Tax Rate	Wife's Monthly Share	Marginal Tax Rate	Wife's Monthly Share
Date of filing	29%	\$1,397.80	40%	\$1,181.24
Rule of 85	29%	\$2,487.56	40%	\$2,192.17
62	22%	\$2,602.70	27%	\$2,435.86

Ex. Vol. III pp. 71-73. Assuming an equal division of the INPRS Pension, Pollom then calculated the gross monthly benefit to Wife, after taxes, for each of the payout age options and based upon both the effective and marginal tax rates. For example, Pollom calculated that, using a retirement age of 62 and an effective tax rate of 22%, Wife would receive \$2,602.70 per month when Husband retired.

[8] Husband proposed that he pay Wife \$2,602.70 per month from his monthly INPRS Pension once he retires. Husband based his calculation upon the present value of the INPRS Pension based upon Husband retiring at age 62 and the application of a 22% effective tax rate. Wife proposed: (1) a 60%/40% split

³ Pollom defined an effective tax rate as “the actual . . . federal tax plus state tax divided by taxable income” and defined a marginal tax rate as the rate by which “any additional dollar” would be taxed. Tr. Vol. II pp. 94, 96. Pollom estimated the effective and marginal tax rates.

of the marital estate in her favor; (2) that Husband pay an equalization payment of \$1,052,592.54 to Wife based upon the value of the Pension with retirement at the age of fifty-five; (3) that the equalization payment be paid by Husband transferring certain annuities to Wife and paying Wife \$3,000.00 per month for thirty years; and (4) that Husband name Wife as the beneficiary on his INPRS Pension and name her as the beneficiary on a \$500,000.00 life insurance policy.

[9] The trial court entered findings of fact and conclusions thereon granting the petition for dissolution of marriage and dividing the marital estate. With respect to the INPRS Pension, the trial court found:⁴

71. The Court finds that the marital estate should be divided as set forth on Husband's balance sheet with Husband receiving all of his retirement accounts, with the pension being divided as set forth herein. Husband's balance sheet reflects a division in Wife's favor of 51%. However, considering what Husband has paid on Wife's behalf since the date the petition was filed, her share equates to 57%. This is fair and reasonable.

72. The Court finds that Husband's pension benefits shall be divided at the time he retires. Each Party shall receive one half of the net, after tax, monthly benefit that was earned during the marriage, thus the coverture fraction is applied. Husband shall retain the balance of the monthly benefit including all growth, gains, credits, and post filing benefits.

⁴ We note that the trial court adopted verbatim Husband's proposed findings of fact and conclusions thereon regarding the pension findings.

* * * * *

18. Excluding the small percentage of Husband's pension he owned at the time of the marriage, the Court concludes that both parties have contributed to the accumulation of the assets and debts as they both were employed throughout the marriage and they both were involved in raising the children until the Parties separated. Although Husband earns income that exceeds that of Wife's, she holds an advanced college degree and is gainfully employed. Wife receives regular financial gifts from her family. Wife is not supporting any of the marital children and there was no evidence that she had been providing meaningful support to the children prior to or after the Parties separated. In fact, she failed to pay child support for [J.S.]. Wife has had disposable income available to her while Husband paid the majority of her living expenses. Wife cashed out her retirement account during the pendency of this matter. There was no evidence presented indicating that Wife was required to do so for financial reasons. After the final determination, Wife will have much less marital debt to pay than Husband.

* * * * *

21. [] Applying what Husband paid toward Wife's living expenses, Wife will receive a sum equivalent to 57% of the estate.

* * * * *

28. Because the INPRS is exempt to division by a qualified domestic relations order (QDRO) (see IC 5-10.3-8-9), if the pension is divided, it will be Husband's responsibility to provide a monthly check to Wife upon his retirement. Husband will also be fully responsible for the entire tax burden since the pension benefit is sent to him. The tax rate will be based on Husband's income.

* * * * *

40. Husband's pension is substantial and constitutes the majority of the marital estate. Application of the coverture fraction is fair and reasonable. The amount earned prior to the marriage is small and the overall division still results in a deviation in Wife's favor.

41. The present marital portion value of the pension is \$1,189,924.53 when Husband is age 62. Applying 22% tax rate he will pay \$261,783.40 over the life of the benefit. It would be unjust and unreasonable to ignore this heavy tax in relation to the division of the estate.

42. A tax consequence will occur as a result of the division of the estate and it cannot be omitted from the division of the estate. To do so would be an enormous departure from law and would not be a just and reasonable division of the marital estate.

43. The projected full benefit when Husband is age 62 is \$7,007.21. The coverture fraction shall be applied resulting in 95.24% of this benefit constituting the marital portion which is \$6,673.59. Thereafter, the tax shall be applied and charged equally to both Parties. The net marital share shall then be equally divided.

44. Husband's witness projects a 22% tax rate will result if Husband has no other income. This is a reasonable projection and in line with the presumed tax rate of 21.88% utilized for the calculation of child support. After application of 22% tax to the marital share of the benefit, the net monthly benefit of \$5,205.40 should be equally divided when Husband retires with Wife receiving \$2,602.70 each month until she dies at which time the entire benefit shall revert back to Husband. Should Husband die before Wife, Wife's benefit shall cease.

45. Husband shall retain the balance of the monthly benefit including the portion earned prior to the marriage, his marital share, all of his post filing earnings, gains, growth and benefits.

46. Dividing the pension at the time Husband retires and as specifically set forth herein is fair and reasonable and in compliance with the law.

47. The second issue pending regarding Husband's pension is that Wife is requesting an immediate cash payment offset for her share of the pension instead of waiting for Husband to retire.

48. Facts to consider in favor of an immediate offset include: "value of the pension is relatively modest; the parties are highly litigious, the separating parties are relatively young, and the receiving spouse has immediate and substantial financial need." *Kendrick v. Kendrick*, 44 NE3d 721, 726 (Ind. Ct. App. 2015) a [sic] relying on *Equitable Distribution of Property*, by Brett. R. Turner at Section 6:36.

49. The *Kendrick* appellate court recognized that a payor must have sufficient liquid funds to make installment payments if an immediate cash offset is ordered. *Id.* at 727.

50. Wife is 52 years old, has an advanced college degree, is employed earning \$63,000 a year and receives money from her family on a regular basis. Wife will receive the marital residence which has substantial equity. Wife has significantly less debt than Husband and she has been able to pay some of her debts in full since Husband has been paying her living expenses during the pendency of the divorce. Wife had a retirement account on the date of filing worth approximately \$10,000. She withdrew the entire amount from the account in December 2020. She does not have an immediate or substantial financial need.

51. Husband's pension cannot be described as modest. Husband was 53 at the date of the final hearing. The Parties are not highly litigious, in fact, they cooperated without a provisional order during the pendency of this case.

52. Due to the heavy marital debt load that exists, most of which is assigned to Husband, he is not in a financial position or have disposable income to pay an immediate cash offset to Wife.

53. Husband's pension is substantial in comparison to the rest of the marital estate. Applying the coverture fraction, the present value is \$1,189,924.53 when Husband is age 62.

54. It is unjust and unreasonable to place all of the risk related to the pension on Husband's shoulders as requested by Wife. Assuming Husband was able to pay an immediate offset, Wife will enjoy her share immediately as Husband may not live to receive the pension benefit.

55. Because an equal division of the estate is fair and reasonable, it is logical that the risk associated therewith should also be equally realized as a fair and reasonable division.

56. Wife's request that the Court ignore the inevitable tax consequence related to the pension when Husband retires is contrary to law, unjust and unreasonable. Doing so would further skew the division of the estate greatly in Wife's favor.

57. At the time Husband filed for divorce, he was 52. In order to retire early and receive an unreduced benefit, the participant must meet the "Rule of 85". Husband did not meet this requirement because he was not 55 years old at the time of filing.

58. Husband is now 53 years old. Husband can retire at age 62, but is not required to do so, and receive the full unreduced projected gross monthly benefit valued at \$7,007.21 with 95.24% of this being during marriage.

59. Neither the state nor the school corporation can force Husband into mandatory retirement. IC 5-10.4-5-5.

60. Husband cannot afford to retire due to marital debt, the need to support the children while they are in college and simply because Husband loves his job and does not wish to retire.

61. Excluding the value of the pension, the Parties' net marital estate is \$116,996.88.

62. The marital estate does not contain sufficient assets to set over to Wife to account for the large net half of Husband's pension.

63. Husband is not required to pay a cash offset to Wife and the pension shall be divided as set forth herein.

Appellant's App. Vol. II pp. 17-27. Wife now appeals.

Analysis

[10] Wife appeals the trial court's division of property in the dissolution action. Specifically, Wife contends: (1) "[w]hether the trial court erred in conditioning the division of the marital estate on Husband's future, unknown retirement date"; (2) "[w]hether the trial court made findings unsupported by the evidence that led to its erroneous conclusion that it was just and reasonable to delay Husband's payments to Wife until his future, unknown retirement date"; and

(3) “[w]hether the trial court erred in applying a speculative tax rate to Husband’s pension.” Appellant’s Br. p. 5.

[11] 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). “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.*

[12] “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.*

I. Distribution of the INPRS Pension

[13] Wife’s first two arguments concern the trial court’s distribution of the INPRS Pension. “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); *see* Ind. Code § 31-15-7-4(a). “After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal division is just and reasonable.” *Eads*, 114 N.E.3d at 874. The presumption of an equal division may be rebutted by the presentation of certain factors detailed in Indiana Code Section 31-15-7-5. The trial court, however, must state its reasons for deviating from the presumption of an equal division in its findings and judgment. *Id.* at 874.

[14] Pursuant to Indiana Code Section 31-15-7-4(b), the trial court “shall divide the property in a just and reasonable manner by”:

- (1) division of the property in kind;
- (2) setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an amount, either in gross or in installments, that is just and proper;
- (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale; or

(4) ordering the distribution of benefits described in IC 31-9-2-98(b)(2) or IC 31-9-2-98(b)(3) that are payable after the dissolution of marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

[15] Indiana Code Section 31-9-2-98(b) provides:

“Property”, for purposes of IC 31-15, IC 31-16, and IC 31-17, 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.

Here, Husband’s pension benefits are not forfeited upon termination of his employment and are therefore “property” as defined in Indiana Code Section 31-9-2-98(b).

[16] The trial court here deviated from the presumption of an equal division, and the parties do not dispute the deviation; rather, Wife disputes the value and method used by the trial court to distribute the marital property—specifically the value of the INPRS Pension and how Husband is to pay Wife a portion of his INPRS Pension.

A. Value of INPRS Pension

- [17] The trial court has broad discretion in ascertaining the value of property in a dissolution action, and we will not disturb its valuation absent an abuse of that discretion. *Kakollu v. Vadlamudi*, 175 N.E.3d 287, 299 (Ind. Ct. App. 2021), *trans. denied*. “The trial court does not abuse its discretion if there is sufficient evidence and reasonable inferences therefrom to support the result.” *Id.* “In other words, we will not reverse the trial court unless the decision is clearly against the logic and effect of the facts and circumstances before it.” *Id.* We will not weigh evidence, and we will consider the evidence in a light most favorable to the judgment. *Id.*
- [18] In valuing a pension, the trial court must determine “(1) what evidence must be presented to establish the value of the benefit, (2) what date must be used to assign a dollar amount to the benefit, and (3) how much of the benefit’s value was the result of contributions made after the final separation date.” *Granzow v. Granzow*, 855 N.E.2d 680, 685 (Ind. Ct. App. 2006). The trial court here was presented with three options from the pension evaluator in valuing Husband’s INPRS Pension on the date of filing based upon three payout age options: (1) Husband’s age at the time of filing of the petition for dissolution, which is an early retirement with reduced benefits; (2) the age of fifty-five, based upon the Rule of Eighty-Five; and (3) the age of sixty-two. Wife does not challenge these specific valuations, which were provided by Husband’s expert.
- [19] Husband requested that the trial court use the present value of the Pension based upon a retirement age of sixty-two, while Wife requested that the trial

court use the present value of the Pension based upon a retirement age of fifty-five. Husband, however, was fifty-two years old at the time of filing, and at the time of the hearing, Husband testified that he had no plans to retire in the near future because he enjoys his employment and because he cannot do so due to his substantial debts. Husband testified that most of his colleagues retire at the age of sixty-two or older. The trial court agreed with Husband and used the present value of the Pension based upon Husband's retirement at the age of sixty-two.

[20] On appeal, Wife argues that the value of the pension would have been greater if the trial court had used the present value based upon a retirement age of fifty-five and that the trial court's decision gives Husband control over the value. Husband testified, however, that he had no plans to retire at the age of fifty-five, and Husband gave valid reasons for delaying his retirement into his sixties. Our Supreme Court has noted that a dissolution court cannot compel an "involuntary retirement." *In re Marriage of Adams*, 535 N.E.2d 124, 127 (Ind. 1989). The trial court was presented with three options to value Husband's INPRS Pension and chose the option that most closely represented the evidence presented regarding Husband's actual retirement plans. We cannot say this was an abuse of discretion.

B. Method of Distribution

[21] The trial court here ordered Husband to pay Wife a portion of his INPRS Pension benefits when he retires.⁵ Wife contends, however, that the trial court should have ordered an equalization payment from Husband to Wife beginning immediately rather than ordering Husband to pay Wife a portion of his pension benefits when he retires.

[22] Although the trial court was prohibited from dividing Husband’s INPRS Pension by way of a QDRO or otherwise ordering Husband to assign his benefit payments to Wife, the trial court “did nevertheless have the obligation to divide the marital estate under [Indiana Code Section] 31-15-7-4 and had the option to order Husband to make an equalization payment or payments to effect the division.” *Kendrick v. Kendrick*, 44 N.E.3d 721, 726 (Ind. Ct. App. 2015). “Courts utilize a number of methods for distributing pension benefits,

⁵ The trial court used the “date-of-divorce approach,” which this Court described in *Eads* with the following formula:

$$\text{Date-of-divorce coverture fraction} = \frac{\text{creditable time during marriage}}{\text{total creditable time at divorce}}$$

Eads, 114 N.E.3d at 876. The *Eads* Court explained the formula as follows:

[T]his fraction uses total creditable time at divorce as the denominator, because the fraction is multiplied by what the monthly payment would be at divorce. . . . [T]he denominator of the fraction must match exactly the period of time over which the employee acquired the benefit by which the fraction is being multiplied.” For example, an employee works 30 years: 5 years before the marriage, 15 years during the marriage, and 10 years after the marriage. According to the evidence presented, the employee’s pension payment would have been \$1000 per month had he retired at divorce. Thus, the coverture fraction is years married divided by years of employment at divorce, or 15/20 (75%). To compute the total marital interest in the pension, the fraction is multiplied by what the monthly payment would be at divorce (not the actual pension payment, which presumably would be larger), 75% x \$1000 per month = \$750 per month.

Id. (internal citations omitted).

including an immediate offset method, a deferred distribution method, or a variation or combination of the methods.” *Id.*

Under the immediate offset method, the court determines the present value of the retirement benefits and awards the nonowning 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. Under the deferred distribution method, the court makes no immediate division of the retirement benefits but determines the future benefits to which the nonowning spouse is entitled. Traditionally, the benefits have been stated as a share of the owning spouse’s future benefit, and payment can be made directly to the nonowning spouse by the plan administrator under certain circumstances or payment can be ordered to come directly from the owning spouse.

Several fact situations may favor the use of an **immediate offset method**, including where **the present value of the pension is relatively modest, the parties are highly litigious, the separating parties are relatively young, and the receiving spouse has immediate and substantial financial need**. Other fact situations may favor a **deferred distribution method**, including where **there is not sufficient other tangible property remaining in the marital estate so that a present award is possible, there is an unusually substantial risk that benefits will never be received, the present value of benefits is difficult to compute with reasonable accuracy, and both spouses have no other steady source of income for their retirement years**.

It is also possible to apply both the deferred distribution and immediate offset methods in a single case. One such way to combine the methods is to order an offsetting cash award payable in installments. Such an award can give the benefits of immediate offset in a case where there are not sufficient funds available for an immediate cash payment. Like the immediate

offset method, deferred offset awards are limited by the liquid funds available in the marital estate. However, the limitation is not as severe as with an immediate offset award, because a deferred award is spread out over time, but the payor must still have sufficient liquid funds to make the installment payments.

Id. at 726-27 (citing Brett R. Turner, 2 EQUIT. DISTRIB. OF PROPERTY, 3d §§ 6:30, 6:36 (2014) (internal citations omitted) (emphasis added)).

[23] Wife argues that several of the trial court’s findings related to determining whether an immediate offset or a deferred distribution was warranted were not supported by the evidence. Specifically, Wife argues the findings on the following issues were clearly erroneous: (1) the martial estate does not contain sufficient assets to set over to Wife to account for the large net half of Husband’s pension; (2) Husband’s ability to retire at the age of fifty-five; (3) Husband’s ability to make Wife’s requested payments; (4) the risk of using the immediate offset method; and (5) the parties’ financial behavior during the marriage. Our review of the record, along with Wife’s arguments and the trial court’s findings, however, reveal that Wife’s arguments are merely requests to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. The findings at issue are not clearly erroneous.

[24] Wife also argues that *Kendrick* necessitates a conclusion that an immediate offset was required here. In *Kendrick*, this Court addressed a division of marital property in a dissolution proceeding that involved a husband’s Public Employees’ Retirement Fund (“PERF”) pension, which is also not divisible by a QDRO. The trial court found that the pension value was \$116,233.64,

ordered an equal division of the marital estate, and ordered the husband to pay an equalization payment of \$62,154.17 by making monthly \$500.00 payments to the wife. The husband appealed “the trial court’s order that he begin making monthly equalization payments prior to his retirement and the distribution of his pension benefits.” *Id.* at 724.

[25] This Court noted:

The evidence establishes that Husband’s pension represents a significant portion of the marital property and that Husband was fifty-six years old at the time of the hearing. The evidence does not indicate that Husband or Wife have other steady sources of income for their retirement years. These factors may tend to favor a deferred distribution. The absence of sufficient other tangible property remaining in the marital estate so that a total present award was possible, required, at a minimum, that any setoff be payable in installments. Wife testified she receives approximately \$900 per month in social security disability benefits and that, if it were not for her son, she would not have a place to live. Husband does not know when he may retire, there is not an unusually substantial risk that Husband’s benefits will never be received, and the present value of benefits is not difficult to compute with reasonable accuracy. These factors favor an immediate offset or an offsetting cash award payable in installments which begin immediately. The trial court ordered monthly payments which took into account the evidence and the parties’ needs and resources. The trial court’s order does not force Husband to retire, and he will receive any increase in the value of his pension due to his continuing to work.

Id. at 727. Thus, this Court concluded that, “applying the deferential standard of review for division of marital property and in light of the considerations discussed above, we cannot say that the trial court abused its discretion in

ordering that Husband make monthly payment to Wife beginning immediately rather than after he retires and starts receiving his pension benefit.” *Id.*

[26] We conclude that *Kendrick* is readily distinguishable. Here, Husband’s INPRS Pension, which the trial court valued at \$1,189,924.53 after application of the coverture fraction, was by far the largest asset in the marital estate. Without the INPRS Pension, the marital estate was valued at only \$116,996.88. The present value of the Pension is not “modest.” *Id.* at 726. The parties are not “highly litigious,” and they are in their early fifties. *Id.* Further, Wife does not have an “immediate and substantial financial need” for the immediate payments given her employment situation. *Id.* Wife has an advanced degree and earns approximately \$63,000.00 per year. Although Husband earns far more than Wife, Husband took on substantial debt, including over \$220,000.00 in student loans, college expenses for the children, and a large tax debt. Furthermore, Husband presented evidence that he does not have the funds available to pay Wife’s requested \$3,000.00 per month for thirty years to effectuate an immediate payment of Wife’s portion of the INPRS Pension.

[27] We conclude that, overall, the circumstances here weigh in favor of the deferred distribution method. Although the trial court here could have chosen to use the immediate offset method or a combination of the two methods, it certainly was not required to, and the use of the deferred distribution method was not an abuse of discretion. The trial court determined the value of Husband’s Pension at retirement age of sixty-two and rejected Wife’s request to make cash equalization payments prior to retirement. This was within the trial court’s

discretion. Accordingly, we affirm the trial court's use of the deferred distribution manner in distributing the INPRS Pension.

C. Survivor's Benefits

[28] Although the trial court awarded Wife a portion of Husband's INPRS Pension, we note that the trial court also ordered the following: "Applying a 22% tax rate to the marital share is a net of \$5,205.40 with Wife's half being \$2,602.70 each month **until she dies at which time the entire benefit shall revert back to Husband. Should Husband die before Wife, Wife's benefit shall cease.**" Appellant's App. Vol. II p. 31 (emphasis added). Accordingly, although Wife was awarded a portion of the Pension, her ability to collect that amount is dependent upon her lifespan and Husband's lifespan.

[29] During her testimony, Wife asked to be named "beneficiary" on Husband's pension, which "has a five (5) year guarantee." Tr. Vol. II p. 147. Husband's pension valuation expert, Andrews, noted in his report that the Pension "is a defined benefit pension that requires 10 years to vest and, in their standard form, are single life payable with a five-year guarantee." Ex. Vol. III p. 59. The parties did not, however, present evidence explaining the five-year guarantee or whether Wife could be named as the "beneficiary," and the trial court did not order Wife to be named the "beneficiary." Further, Wife also asked for Husband to name her as the beneficiary on a \$500,000.00 life insurance policy, and the trial court denied this request.

[30] On appeal, Wife emphasizes:

There are two risks for Wife under the trial court's order: (1) that she dies prior to Husband's retirement or (2) that Husband dies prior to his retirement. In both of those situations, Wife receives nothing; in the former, however, Husband significantly benefits because he receives all of his pension. On the other hand, there are no risks for Husband under the current order as he pays nothing to Wife until he retires. While the trial court seeks to equitably divide the risk, the order actually does the opposite by placing the risk only on one party, the Wife.

Appellant's Br. p. 12.

[31] Absent from the record is whether Husband can name Wife as a beneficiary to his Pension and, if Husband can, how the amount of the benefit is impacted and how such Pension benefits can be given to a beneficiary. The trial court specifically ordered that, if Husband dies, Wife is not to receive any payments thereafter. The trial court, thus, has placed a value of Wife's portion at more than \$500,000.00 yet, without evidence to support the findings, ordered that Wife cannot receive benefits after Husband's death. On the other hand, if Wife dies, Husband receives the entire Pension benefit. This is a quagmire that is not easily resolved. *See, e.g., Wilhelm v. Wilhelm*, 397 N.E.2d 1079, 1082 (Ind. Ct. App. 1979) ("The property settlement award is to be final, regardless of whether it is to be made by payment of a lump sum or payments in installments, or a transfer of property. It should not be subject to modification as the circumstances of the parties change.") (internal citations omitted).

[32] This Court has held that pension survivor benefits are a marital asset. *See, e.g., Carr v. Carr*, 49 N.E.3d 1086, 1090 (Ind. Ct. App. 2016), *trans. denied*; *Leonard v.*

Leonard, 877 N.E.2d 896, 900-01 (Ind. Ct. App. 2007). The difficulties of addressing such survivor benefits were discussed extensively in Brett R. Turner's *Equitable Distribution of Property* treatise:

If survivor benefits have not yet been elected—that is, if divorce occurs before retirement—the issue of whether a spouse should be ordered to elect benefits can be close and difficult. There is no doubt that the court has the power to order election; the issue is whether that power should be exercised on the facts.

The question is difficult because survivor benefits are usually not free. Rather, they are paid for with a reduction in normal retirement benefits. Spouses in intact families, not anticipating divorce, do not always desire survivor benefits; that is why postretirement survivor benefits are usually elective. Intact families will obviously want to provide some sort of financial insurance for the nonowning spouse, to protect against financial hardship if the owning spouse dies early. But such protection can be provided by life insurance or other financial vehicles as well as by survivor benefits. As retirement approaches, intact families generally compare the benefits and costs of survivor benefits against other similar options and decide what method works best for providing the necessary security.

When the family is not intact, the final decisions regarding retirement security must obviously be made by the court when the parties cannot agree. But even where the court makes the decision, survivor benefits may not always be the best choice. Their cost may be excessive compared to the benefits offered; life insurance or other financial options may provide more security for less cost. When this is true, the court should have discretion to require this sort of coverage instead of survivor benefits.

Brett R. Turner, 2 EQUIT. DISTRIB. OF PROPERTY, 4th § 6:44 (footnotes omitted).

[33] Here, Wife requested both survivor benefits and life insurance to protect her in the event of Husband's death; the trial court, however, awarded neither. Under these circumstances, Wife's access to a marital asset awarded to her in the dissolution is contingent upon Husband's lifespan. We conclude that the trial court erred by failing to award either survivor's benefits or protection of Wife's portion of the Pension benefits through another means, such as life insurance. Accordingly, we reverse in part and remand for the trial court to hear evidence on this issue.

II. Tax Consequences

[34] Wife also argues that the trial court abused its discretion by taking into account the tax consequences of the INPRS Pension in its distribution. 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."

[35] Because the INPRS Pension is not subject to a QDRO, Husband will be required to pay taxes on the monthly benefits that he receives. Wife, however, argues that the tax rate is speculative and that Husband should be solely responsible for the taxes incurred. The trial court here was presented with expert evidence on the marginal and effective tax rates for the three payout

options. The trial court applied a 22% effective tax rate to reduce benefits so that the tax consequences are shared by the parties. Husband points out that \$261,783.40 in taxes are potentially at issue, which would significantly change the distribution of marital property if he is required to pay all of the taxes.

[36] We addressed a similar issue in *Eads*, 114 N.E.3d at 877-78. There, the trial court attempted to “transfer the tax burden on Wife’s portion of [Husband’s] pension” to Wife by way of a Form 1099-R. We held that a “Form 1099-R is not a proper way to transfer Wife’s tax burden to her,” and we remanded so “the trial court can address the tax consequences by reducing Wife’s percentage of Husband’s monthly pension payment to account for the fact Husband is paying taxes on her portion.” *Eads*, 114 N.E.3d at 877-78.

[37] Similarly, in *Maxwell v. Maxwell*, 163 N.E.3d 337, 341-42 (Ind. Ct. App. 2021), *trans. denied*, we held:

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 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 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.

(internal footnotes omitted).

[38] Here, Husband will also be the party who receives the pension distributions and will be responsible for the taxes. As in *Maxwell*, assigning this burden to Husband alone would significantly skew the apportionment of marital assets. Accordingly, it was not an abuse of discretion for the trial court to consider the tax burden on Husband in crafting the distribution of marital assets. In doing so, the trial court relied upon expert testimony as to the likely tax rate at the time of Husband's retirement. Although the expert did not have a crystal ball to predict the tax rate with certainty, we cannot say the trial court abused its discretion given the nature of dividing pension benefits without a QDRO.

Conclusion

[39] The trial did not abuse its discretion in its division of the marital property. The trial court, however, erred by failing to award either survivor's benefits or protection of Wife's portion of the Pension benefits through other means, such as life insurance. Accordingly, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

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

Riley, J., and May, J., concur.