MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Milton Davis,
Appellant-Respondent,

v.

Michelle M. Davis,
Appellee-Petitioner.

March 14, 2022

Court of Appeals Case No. 21A-DN-741

Appeal from the Marion Superior Court

The Honorable James A. Joven, Judge
The Honorable Ryan Gardner, Judge

Trial Court Cause No. 49D10-2003-DN-11931

Najam, Judge.

Statement of the Case

[1] Milton Davis ("Husband") appeals the trial court's decree of dissolution of his marriage to Michelle Davis ("Wife"). Husband raises two issues for our review, namely:

1. Whether the trial court lacked subject matter jurisdiction to enter the decree of dissolution.

2. Whether the trial court abused its discretion when it divided the marital estate.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] Husband and Wife were married in 2010, and there are no children of the marriage. On March 19, 2020, Wife filed a petition for dissolution of the marriage. On August 25, the original trial court ("Court 13") held a final evidentiary hearing on the petition, and on December 14, Court 13 made an entry on the chronological case summary ("CCS") dividing the marital assets and instructing Wife's attorney to prepare a proposed final decree accordingly. That entry stated as follows:

> Comes now the Court and offers [a] sincere apology for failing to issue a ruling on this case in a timely manner. After review of all of the evidence presented, the Court now directs counsel for Wife to submit a Decree that adopts Husband's proposed division of the marital estate with two exceptions: Husband shall have possession of the marital residence and equity therein, and the personal property, including jewelry, shall be sold and the

> proceeds divided equally. After removing personal property totals from Husband's Exhibit 28 in the amount of $33,150, the value of the assets of the marriage totals $559,698.55. Wife will receive assets totaling $44,241.31 and Husband will receive $514,757.24. Wife shall pay $52,327.10 in liabilities and Husband shall pay $270,107.64. The net martial estate . . . is $237,263.81. To equalize the distribution, each party should net $118,631.91. Husband will therefore owe Wife $126,627.70 ($118,631.91 + 52,327.10 - 44,241.31). This equalization payment shall be a judgment against Husband and if it is not paid within 180 days of approval of the Decree, the marital residence shall be sold and the judgment paid from the proceeds. Wife shall vacate the home by 6pm on 12/31/20, and she shall be responsible for all utilities until that date and time. Counsel for Wife shall prepare and submit the QDROs necessary to divide Husband's retirement assets of his USPS FERS and his military pension.

Appellant's App. Vol. 2 at 12.

[4] Following a conference among the parties' attorneys and the judge, on January 11, 2021, Court 13 made an entry in the CCS clarifying the December 14 entry which stated as follows:

> Counsel appear for attorney conference to clarify the Court's order re: Decree. Court notes that Husband's VA pension cannot be divided, but his military pension, although earned prior to this marriage, shall be divided 50/50. Under Indiana's One-Pot Theory, all assets are part of the marital estate for division, unless protected by a prenuptial agreement. Personal property is further defined to mean all household items, not just furnishings. And the potential sale of the marital residence is clarified as follows: if equalization payment is not made within 180 days of [the] Decree, the home shall be listed for sale within 30 days. If the home is not timely sold, the Court will entertain

> appointing a Commissioner to manage the sale. Finally, the prior Order is clarified to note that the Court adopted Wife's Exhibit 28 rather than Husband's A.

Id. at 14.

[5] On March 19, Wife filed a proposed final decree with Court 13. On March 21, Husband filed a motion to strike the proposed decree and a motion for appointment of a special judge pursuant to Indiana Trial Rule 53.2. In relevant part, Husband sought a special judge because he alleged that Court 13 had not yet issued a final judgment following the August 25, 2020, evidentiary hearing. On March 22, Court 13 made a CCS entry stating that the case was being "reassigned to a Transitional Family Court per local rule." Appellant's App. Vol. 2 at 15. And on April 6, the new trial court ("trial court") denied Husband's motion to strike and motion for special judge. Also on April 6, the trial court issued the final dissolution decree purporting to divide the marital estate equally. The final decree was consistent with Court 13's December 14, 2020, CCS entry and its January 11, 2021, CCS entry. Husband filed a motion to correct error, which the trial court denied. This appeal ensued.

Discussion and Decision

Standard of Review

[6] Husband appeals the trial court's final decree dissolving his marriage to Wife. A trial court has broad discretion in dividing the marital estate, and we will reverse a trial court's decision only for an abuse of discretion. *Goodman v. Goodman*, 94 N.E.3d 733, 742 (Ind. Ct. App. 2018), *trans. denied*. "The 'party

challenging the trial court's division of marital property must overcome a strong presumption that the trial court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal.'" *Id.* (quoting *O'Connell v. O'Connell*, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008)). On review, we will neither reweigh evidence nor assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. *Id.*

Issue One: Subject Matter Jurisdiction

[7] Husband first contends that the trial court, which received this case in March 2021, lacked subject matter jurisdiction to issue the final dissolution decree in April 2021. In support, Husband asserts that the transfer from Court 13 to the trial court violated Marion County Local Rule LR49-TR76-221, which provides that

> [n]o case filed in the Circuit Court or the Marion Superior Court, Civil Division, may be transferred or consolidated to another room or court except upon written motion accompanied by written order for the signature of the forwarding Court. The order shall not be approved and signed by the forwarding Judge unless such order is consented to in writing by the Judge of the receiving Court.

Here, Husband points out that the case was transferred from Court 13 without a written motion or order or the consent of the receiving court. Thus, Husband maintains, without citation to relevant authority, that the trial court lacked subject matter jurisdiction to preside over the dissolution. Husband is incorrect.

[8] Our Supreme Court has stated that "[l]ocal rules cannot confer, revoke, or override subject matter jurisdiction[.]" *In re Adoption of J.T.D.*, 21 N.E.3d 824, 825 (Ind. 2014). "Courts receive subject matter jurisdiction over a class of cases only from the constitution or from statutes." *Id.* at 828 (cleaned up). As a matter of law, the trial court has subject matter jurisdiction over dissolution cases. Accordingly, Husband's contention on this issue is without merit.

[9] Husband also asserts that the trial court "lost jurisdiction" over the case when he filed his March 21, 2021, motion to withdraw the case pursuant to Trial Rule 53.2 and that the final dissolution decree is "void ab initio." Appellant's Br. at 14. However, Husband does not support that contention with citation to relevant authority, and nothing in Trial Rule 53.2 supports Husband's contention on this issue. In any event, the Chief Administration Officer for the Indiana Supreme Court determined that Court 13 had properly ruled on the division of the marital estate in its December 14, 2020, CCS entry and that Husband was "not entitled to any relief under T.R. 53.2." Appellee's App. Vol. 2 at 53. Husband has not shown any error on this issue.

Issue Two: Division of Marital Estate

[10] Husband next challenges the trial court's division of the marital estate on several grounds. The disposition of marital assets is within the dissolution court's sound discretion, and we will reverse only for an abuse of that discretion. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). We consider only the evidence most favorable to the dissolution court's decision, without reweighing the evidence or assessing the credibility of witnesses. *Id.* Although

the facts and reasonable inferences might allow for a conclusion different from that reached by the trial court, we will not substitute our judgment for that of the trial court. *In re Marriage of Marek*, 47 N.E.3d 1283, 1288 (Ind. Ct. App. 2016).

Trial Rule 63(A)

[11] Husband first asserts that "the trial court erred by entering a final dissolution decree on a hearing commenced and concluded by a different trial court and different judicial officer." Appellant's Br. at 13. In support of that contention, Husband cites Indiana Trial Rule 63(A):

> (A) Disability and Unavailability After the Trial or Hearing. The judge who presides at the trial of a cause or a hearing at which evidence is received shall, *if available*, hear motions and make all decisions and rulings required to be made by the court relating to the evidence and the conduct of the trial or hearing after the trial or hearing is concluded. If the judge before whom the trial or hearing was held is not available by reason of death, sickness, absence or unwillingness to act, then *any other judge regularly sitting in the judicial circuit or assigned to the cause may perform any of the duties to be performed by the court*; but if he is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, *he may in his discretion grant a new trial or new hearing, in whole or in part*. The unavailability of any such trial or hearing judge shall be determined and shown by a court order made by the successor judge at any time.

(Emphases added). Husband maintains that the trial court "could not reasonably adopt the [proposed final dissolution decree] submitted by [Wife]'s counsel without, at a minimum, reviewing the record," including the record of

the January 2021 attorneys' conference conducted by Court 13. Appellant's Br. at 15. And Husband maintains that there was no record made of that attorneys' conference. Thus, Husband concludes that the trial court abused its discretion when it did not hold another evidentiary hearing prior to entering the final decree. We cannot agree.

[12] First, to the extent Husband contends that the trial court erred because there is no record of the January 2021 attorneys' conference, that issue is waived. Indiana Appellate Rule 31 provides that, "[i]f no Transcript of all or part of the evidence is available, a party . . . may prepare a verified statement of the evidence" and submit it to the trial court for certification. App. R. 31. "It is the appellant's duty to present an adequate record on appeal, and when the appellant fails to do so, he is deemed to have waived any alleged error based upon the missing material." *Rausch v. Reinhold*, 716 N.E.2d 993, 1002 (Ind. Ct. App. 1999), *trans. denied*. Second, to the extent Husband contends that the trial court did not review the transcript of evidence from the August 25, 2020, final evidentiary hearing, Husband has not presented any evidence to support that bare assertion. In any event, Trial Rule 63(A) gives the trial court *discretion* to grant a new hearing, "in whole or in part," and Husband has not shown that the trial court abused its discretion here.

[13] As the Chief Administrative Officer for the Indiana Supreme Court determined, Court 13 issued its decision on the division of the marital estate in its December 14, 2020, CCS entry. And Court 13 clarified that decision in its January 11, 2021, CCS entry. Husband does not direct us to any part of the final decree

that differs from Court 13's decisions in the two CCS entries. Indeed, Court 13 instructed Wife's attorney to prepare the final decree based on Wife's Exhibit 28 and the two CCS entries. The trial court did not deviate from Court 13's decisions. In sum, Husband has not shown that the trial court abused its discretion when it issued the final decree without first holding a new evidentiary hearing.

Final Decree

[14] Husband next contends that the trial court erred when it deviated from the presumption of an equal division of the marital estate without giving any reason for the deviation. And Husband asserts that the trial court committed error when it awarded fifty percent of two of his pensions to Wife. We address each contention in turn.

[15] When a trial court divides marital assets and liabilities, it "shall presume that an equal division of the marital property between the parties is just and reasonable." Ind. Code § 31-15-7-5 (2021). If the court deviates from that presumption, it "must enter findings explaining why it awarded an unequal division of property." *Lulay v. Lulay*, 591 N.E.2d 154, 155-56 (Ind. Ct. App. 1992). When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. *Hendricks v. Hendricks*, 784 N.E.2d 1024, 1026 (Ind. Ct. App. 2003).

[16] Here, the final decree *purports* to divide the marital estate equally between the parties. However, as Husband and Wife both point out, the court miscalculated the equalization payment to Wife. In an attempt to "effectuate an equal division of the net marital estate," the court ordered Husband to pay Wife $126,627.70. Appellant's App. Vol. 2 at 29. But that amount is incorrect. The parties do not dispute that the net marital estate is $298,094.11, and, in the final decree, the court awarded each party $149,047.06. In order to effectuate that division, we agree with Wife that Husband shall pay Wife an equalization payment of $75,459.30. Husband does not dispute that calculation. Accordingly, we remand to the trial court with instructions to correct the amount of the equalization payment stated in the final decree to be $75,459.30. With that correction, the decree divides the marital estate equally between the parties.

[17] Still, Husband maintains that the trial court erred when it ordered that Wife would receive fifty percent of his Federal Employees Retirement System ("FERS") pension and his military pension. In particular, in the final decree, the court ordered Wife's attorney to prepare "the necessary Qualified Domestic Relations Order ("QDRO") and/or the appropriate and necessary transfer forms and documentation required" by the plans' administrators in order to effectuate the payments to Wife. *Id.* at 30, 33.

[18] Husband first contends that "[a]ll government pension plans are excluded from ERISA and division by QDRO," citing 29 U.S.C. § 1003(b)(1), and he points out that this Court "has previously held that PERF accounts, which operate

identically to FERS accounts, may not be divided by a QDRO," citing *Everette v. Everette*, 841 N.E.2d 210, 214 (Ind. Ct. App. 2006) (holding Indiana Code Section 5-10.3-8-9(a) prohibits assignment of PERF benefits in a dissolution decree).[1] However, we need not decide whether a QDRO is permitted with respect to either the FERS or military pensions, because the decree states that a QDRO is only one option and that Wife may otherwise prepare "the appropriate and necessary transfer forms and documentation required" by the plans' administrators in order to effectuate the payments to Wife. Appellant's App. Vol. 2 at 30, 33. Husband contends only that the pensions are not divisible by a QDRO; he does not contend that the pensions are not generally divisible in a dissolution. In any event, our case law illustrates that both FERS and military pensions may be subject to division in dissolution cases. *See, e.g.*, *Story v. Story*, 148 N.E.3d 1155, 1156 (Ind. Ct. App. 2020). The undisputed evidence shows that Husband is vested in both the FERS and military pensions. Thus, they are properly included in the marital estate and subject to division. *See* I.C. § 31-9-2-98(b). And, as the trial court ordered in the decree, "[i]n the event it is subsequently determined that Wife is an ineligible alternative payee" for the military pension or that "Wife's awarded monthly benefit from Husband's military pension cannot be effectuated" through either a QDRO or transfer forms, Husband shall arrange for Wife to receive fifty percent of the

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[1] Notably, in *Everette*, we observed that, while "Husband's PERF account is 'exempt from levy, sale, garnishment, attachment, or other legal process' including a QDRO" under the statute, the court could still achieve an equal division of the marital estate on remand by "adjust[ing] the decree to ensure that Wife still receives an equal share of the marital estate." 841 N.E.2d at 214.

military pension through an automatic monthly electronic funds transfer from Husband's bank account. Appellant's App. Vol. 2 at 31.

[19] Husband also asserts that "the military pension was earned prior to the marriage," and he suggests that the trial court was, therefore, precluded from awarding Wife any part of that pension as a matter of law. Appellant's Br. at 19. But this contention amounts to a request that we reweigh the evidence, which we cannot do. Under Indiana Code Section 31-15-7-5, "[w]hile it is true that the trial court must consider a spouse's contribution of prior acquired property, that is but one factor for review and is entitled to no special weight." *Bertholet v. Bertholet*, 725 N.E.2d 487, 496 (Ind. Ct. App. 2000). In other words, the trial court had discretion to award Wife fifty percent of Husband's military pension despite the undisputed evidence that he had left the military and earned that pension prior to his marriage to Wife. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. *Bringle v. Bringle*, 150 N.E.3d 1060, 1073 (Ind. Ct. App. 2020), *trans. denied*.

[20] Husband further asserts, without citation to authority, that the award of fifty percent of the military pension to Wife "is clearly erroneous as no evidence was presented as to the present-day value of the pension." Appellant's Br. at 19. Notably, however, neither party presented evidence of the values of either the FERS or military pensions other than the amount of monthly income Husband receives from each. This Court has held that, "absent evidence of values the court must exercise its discretion in disposing of the marital assets." *Livingston*

v. Livingston, 583 N.E.2d 1225, 1228 (Ind. Ct. App. 1992), *trans. denied*. And, on appeal, "this Court must presume that the trial court's distribution complied with the statute. There being no evidence to the contrary, the trial court's order as to the division of the marital property was correct." *Id.* Indeed, given that the trial court awarded Wife fifty percent of the FERS and military pensions, that award complies with the equal division of the marital estate on its face. Husband has not shown that the trial court's award of fifty percent of his FERS and military pensions to Wife was clearly erroneous.

Conclusion

[21] The trial court had subject matter jurisdiction to issue the dissolution decree in this case. And, other than a calculation error, the trial court did not abuse its discretion when it divided the marital estate equally. We remand and instruct the trial court to correct the error in the decree regarding the equalization payment to Wife, which shall be $75,459.30. The trial court did not abuse its discretion when it included Husband's military pension in the marital estate and when it awarded Wife fifty percent of Husband's FERS and military pensions.

[22] Affirmed in part, reversed in part, and remanded with instructions.

Vaidik, J., and Weissmann, J., concur.