

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Scott M. Jones,
Appellant-Respondent,

v.

Beth E. Jones,
Appellee-Petitioner

July 8, 2021

Court of Appeals Case No.
20A-DN-2275

Appeal from the Cass Superior
Court

The Honorable A. Christopher
Lee, Special Judge

Trial Court Cause No.
09D02-1801-DN-000003

May, Judge.

[1] Scott M. Jones (“Husband”) appeals the trial court’s order regarding property division as part of the dissolution of his marriage to Beth E. Jones (“Wife”). He presents three issues on appeal, which we restate as:

1. Whether the trial court abused its discretion when it did not divide certain business assets and liabilities as part of the marital pot;
2. Whether the trial court abused its discretion when it ordered an equal distribution of the marital estate; and
3. Whether the trial court abused its discretion when it ordered Husband to pay Wife an equalization payment of \$146,254.00.

We affirm.

Facts and Procedural History

[2] Husband and Wife married on July 7, 2007. Wife alleged that on January 1, 2018, Husband “cut the power” to the marital residence, “shined a flashlight” in Wife’s face, grabbed Wife’s ponytail, and “haul[ed] [her] out on the pavement.” (Tr. Vol. I at 68-9.) Wife sustained head injuries that had to be repaired with staples. The State charged¹ Husband with Level 5 felony battery,² Wife obtained a protective order against Husband, and Husband was put on

¹ These charges were pending at the time of the final dissolution hearing.

² Ind. Code § 35-42-2-1(g).

administrative leave from his job as a firefighter. On January 3, 2018, Wife filed a petition for dissolution of the marriage. There are no children of the marriage.

[3] On July 2, 2018, the parties entered into an agreed provisional order that provided, in part, that Husband would pay \$1000 per month in provisional maintenance to Wife and that Wife would live in the marital residence. On September 3, 2020, the trial court held a final hearing on the petition for dissolution. On the same day, the trial court entered its order dissolving the marriage. The trial court took the issues regarding property division under advisement. Wife filed a motion for findings of fact and conclusions of law on that day as well.

[4] On November 13, 2020, the trial court entered its order on property division. The initial accounting of the marital pot included, among other things, Husband's Firefighter's pension, assets and liabilities associated with Husband's business called Old Style Tavern, the marital residence, four real estate properties Husband owned, multiple vehicles and trailers, and personal property. The order set aside from the marital pot to Husband all assets and liabilities connected to the Husband's business, Old Style Tavern, and four real estate properties Husband owned. To Wife, the trial court set aside some of Wife's jewelry and the appraisal costs for the property in the marital pot.

[5] In its final property distribution, the trial court equally divided the parties' marital pot of \$575,960.00. Specifically, Wife received \$319,059.00 in assets

and \$177,333.00 in liabilities, for a total of \$141,726.00 in distribution. Husband received \$548,400.00 in assets and \$114,265.00 in liabilities, for a total of \$434,135.00 in distribution. To equalize the distribution, the trial court ordered Husband to pay Wife an equalization payment of \$146,254.00, bringing the distribution to equal amounts of \$287,980.00. The trial court also ordered Husband to pay \$5,000.00 in Wife's attorney's fees because he was "non-cooperative with discovery throughout the case, greatly increasing the costs of litigation" (App. Vol. II at 28), and an arrearage of \$8,900.00 for monthly provisional maintenance payments he failed to make pursuant to the agreed provisional order. The trial court ordered the \$160,154.00 total due to Wife "reduced to judgment with interest to accrue at a rate of 8% per annum." (*Id.*)

Discussion and Decision

Standard of Review

- [6] Division of the assets between divorcing parties is left to the trial court's discretion. *Akers v. Akers*, 729 N.E.2d 1029, 1031-32 (Ind. Ct. App. 2000). Even if the facts and reasonable inferences might allow us to reach a conclusion different than did the trial court, we will not substitute our judgment for that of the trial court unless its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* We consider only the evidence favorable to the judgment. *Goodman v. Goodman*, 754 N.E.2d 595, 599 (Ind. Ct. App. 2001), *reh'g denied*. Where, as here, the trial court entered findings and

conclusions pursuant to a party's request, we first determine whether the evidence supports the findings and then whether the findings support the judgment. *Id.* We may not reweigh the evidence or reassess the credibility of the witnesses. *Akers*, 729 N.E.2d at 1032.

1. Old Style Tavern's Assets and Liabilities

[7] In dissolution actions, it is well-settled that

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. *Ind. Code* § 31-15-7-4(a); *Beard v. Beard*, 758 N.E.2d 1019, 1025 (Ind. Ct. App. 2001), *trans. denied* (2002). For purposes of dissolution, property means “all the assets of either party or both parties.” *Ind. Code* § 31-9-2-98 (emphasis added). “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.” *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.” *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008). While 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. *Hill v. Hill*, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). The systematic exclusion of any marital asset from the marital pot is erroneous. *Wilson v. Wilson*, 409 N.E.2d 1169, 1173 (Ind. Ct. App. 1980).

Falatovics v. Falatovics, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014). “It is always the burden of the spouse seeking segregation of an asset from the marital estate to prove the grounds for that segregation and the amount to be segregated.”

Morey v. Morey, 49 N.E.3d 1065, 1073 (Ind. Ct. App. 2016).

[8] Regarding the Old Style business, the trial court found:

3. [Husband] is Old Style Bar and Grill owner, which he purchased in 1996. The Old Style transitioned from a traditional tavern to a bar restaurant during the marriage.

4. [Wife] was minimally involved in the Old Style business during the marriage. [Wife] has no ownership interest in the business or real estate associated with the business. [Wife] is not obligated on the business mortgage or any of the business debts.

5. [Husband] was primarily responsible for the banking, hiring, firing, and otherwise running the Old Style, directly or indirectly through his staff. [Husband] closed the Old Style in December of 2019.

6. There are multiple debts associated with the Old Style, including loans from [Husband’s] family. [Wife] was never consulted and was unaware of many of these obligations.

7. There are three Indiana Department of Revenue tax warrants and one Cass County personal property tax lien, all of which arose after separation. The food service debts listed by [Husband] as debts of the marriage also arose after separation.

* * * * *

28. [Husband] purchased the Old Style bar building on 2/14/96. The Court sets aside all of the Old Style assets to [Husband] and assigns all of the Old Style liabilities to [Husband]. This asset was owned by [Husband] many years before [Husband] and [Wife] married. The Old Style assets and associated liabilities were kept separate throughout the marriage. [Husband] ran the business directly or indirectly by directing management. [Wife] was not aware of the liabilities associated with the business, including the family debts and delinquent tax obligations. [Wife] had little to do with the business.

(App. Vol. II at 15, 22.) Husband challenges the trial court's findings to the extent they minimize Wife's involvement in Husband's business Old Style. He contends the trial court should have divided the business assets and liabilities equally between the parties instead of assigning them solely to Husband because Wife was actively involved in the management of Old Style and in decisions concerning business expenses. Husband asserts Wife "supervised employees at the business; participated in interviews; and otherwise assisted in the business." (Br. of Appellant at 22.)

[9] In support, Husband directs us to Wife's direct examination testimony on the issue, which states, in relevant part:

[Counsel]: What were your management responsibilities [at Old Style]?

[Wife]: Well, it wasn't necessarily any management responsibilities, because I'm not the manager. We had managers, and we had [Husband]. He's the owner. I would go in there and sit with him and listen to like if there's issue with employees or

something like that. I mean, 98 percent of the business was his and 2 percent I was involved, and that's it.

[Counsel]: What do you mean by that?

[Wife]: Like babysitting, you know, reporting back to [Husband] if the servers weren't doing something, if the manager wasn't doing anything. I mean, I was like the devil's advocate. I was just the middle man, because he didn't want to be down there. So I would have to sit there and just watch everything and report back to him.

[Counsel]: Okay. All right. So you were in the bar occasionally?

[Wife]: Yes.

[Counsel]: And you might talk to a staff member or something?

[Wife]: Yeah.

[Counsel]: Okay. Did you run errands from time to time?

[Wife]: No.

[Counsel]: You didn't do any of that?

[Wife]: Not outside the building, no. They might send me downstairs to get a bottle of whiskey or something if they're out at the bar –

[Counsel]: Okay.

[Wife]: --upstairs, but no.

[Counsel]: Were you working on a full time basis in 2013?

[Wife]: Yes.

[Counsel]: Okay. All right. So who did the hiring at the bar?

[Wife]: I think it was a combination between [Husband] and whatever management he had in place at the time from the reopen, and then like maybe talking to me if I knew who the person was, what I thought.

[Counsel]: Okay. Did you ever do any interviews or anything like that?

[Wife]: I sat with [Husband] and did some interviews.

[Counsel]: Okay. Who did the firing?

[Wife]: Usually, [Husband] or Leslie, the manager.

(Tr. Vol. I at 88-89.) However, the portion of Wife's testimony upon which Husband relies to demonstrate she was involved in the business also indicates how little she was responsible for major tasks such as hiring and firing, and the tangential role she played in overall management of the business.

[10] Further, Husband contends Wife knew about the business' finances, including debts Husband owed to family members who had taken out lines of credit to help with Old Style. However, Wife testified she did not communicate with the bank regarding the business finances, was not named on any of the loans advanced for use by the business, that the business was incorporated in Husband's name and she was not a shareholder, and she did not communicate with vendors. Regarding the loans Husband's family took out to assist Husband with the business, Wife testified she did not find out about those obligations until discovery as part of the dissolution action.

[11] Finally, Husband contends Wife was actively involved in the business because she knew and supported the renovation. However, Wife's testimony directly contradicts this contention. Wife testified:

[Wife's Counsel]: . . . And were you a part of that decision to overhaul the bar, from a dive bar, I'll say, to this restaurant?

[Wife]: It's his business, and he's my husband. I wanted him to be happy and that's what he wanted to do, so I listened to what he all wanted to do with his business, yes.

[Wife's Counsel]: I mean, was it his idea or was it yours?

[Wife]: His.

(*Id.* at 86.) Wife also testified that she was not on any of the loans related to the renovation, did not hire any contractors, and acted in a limited capacity regarding certain interior design decisions, however, Husband made the final decision because “it’s just what he’s going to do. It’s his business.” (*Id.* at 88.)

[12] Wife’s testimony regarding her minimal involvement with the Old Style Tavern supported the trial court’s findings. Husband’s arguments to the contrary are invitations for us to reweigh the evidence, which we cannot do. *See Akers*, 729 N.E.2d at 1032 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Regarding the other factor we must consider, whether Wife presented evidence regarding the amounts to be segregated, Wife provided multiple binders of evidence outlining all assets and liabilities of the marital pot and provided detailed testimony about those items. Therefore, the trial court did not abuse its discretion when it set aside all of Old Style’s assets and liabilities to Husband and did not divide them equally between the parties. *Cf. Morey*, 49 N.E.3d at 1073 (segregation from the marital pot of a portion of husband’s pension was an abuse of discretion because husband did not present evidence of the amount to be set aside).

2. Division of Marital Assets

[13] A party challenging a property division must “overcome a strong presumption that the court considered and complied with the applicable statute.” *In re Marriage of Bartley*, 712 N.E.2d 537, 542 (Ind. Ct. App. 1999). We consider the court’s disposition of marital property “as a whole, not item by item.”

Krasowski v. Krasowski, 691 N.E.2d 469, 473 (Ind. Ct. App. 1998). When we review the division, our focus is on what the court did, not what the court could have done. *Akers*, 729 N.E.2d at 1032.

[14] The division of marital property is governed by Indiana Code section 31-15-7-4, which states:

(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.

(b) The 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.

We presume just and equitable division is synonymous with equal division between the parties. Ind. Code § 31-15-7-5. If one party feels an equal division is not just and equitable, that party may rebut the presumption of equal division by presenting evidence regarding the following factors:

(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.

[15] Husband argues the trial court abused its discretion when it ordered an equal division of the marital estate because he owned the marital residence prior to the marriage and made significant improvements to the marital residence during the marriage using his inheritance. He claims Wife, by her own admission, was a “kept woman” (Tr. Vol. I at 27), who did not bring any assets into the marriage, nor did she “bring any significant assets in during the marriage” and thus she should have received less of the marital pot than Husband. (Br. of Appellant at 27.) Further, he contends that, by the time of the final hearing, the parties’ respective economic circumstances had changed. Wife was earning a modest income. Husband no longer had income because he could not work as a firefighter while felony charges were pending against him and “his debts exceed his liquid and available assets.” (*Id.*)

[16] Husband’s argument about the property division ignores evidence that Wife cared for the home during the marriage and while the dissolution was pending.

Husband testified Wife took care of some of the landscaping and the inside of the home. In addition, Wife testified she spent her inheritance money to buy Husband a motorcycle that he retained as part of the property division and to “make the house payment, to buy the groceries. Just bills that came up; things like that.” (Tr. Vol. I at 42.) Wife also testified she had been employed with Republic Services for twenty-six years and while Husband paid all of the household bills, she “took care of things in the household like the groceries and items like that, going to Walmart, you know, toiletries, things like that. Stuff for my son; stuff for [Husband]. . . . food, clothes, stuff like that for my family.” (*Id.* at 43.) Finally, Husband’s income decreased significantly as a result of a felony charge that was filed after he allegedly attacked Wife in the marital home and subsequently was suspended without pay from the Fire Department. Husband’s argument is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Akers*, 729 N.E.2d at 1032 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Husband has not rebutted the statutory presumption of equal division of the marital pot, and therefore the trial court did not abuse its discretion when it divided the marital pot equally between the parties. *See, e.g., Harris v. Harris*, 42 N.E.3d 1010, 1017-8 (Ind. Ct. App. 2015) (husband did not rebut presumption of equal division of marital pot).

3. Equalization Payment

[17] Here, the trial court ordered Husband to pay Wife \$146,254.00 as an equalization payment, which he argues represents Wife’s share of Husband’s

pension. The trial court further ordered Husband to pay 8% interest on the entire judgment of \$160,154.00.³ Husband contends the trial court abused its discretion when it ordered him to pay Wife's share of Husband's pension as an immediate offset award because those benefits are "speculative, at best" (Br. of Appellant at 17), in light of Husband's recent suspension from the Fire Department. However, neither party provided evidence that a felony conviction would divest Husband of the pension already accumulated.

[18] Husband relies upon *Kendrick v. Kendrick*, 44 N.E.3d 721 (Ind. Ct. App. 2015), *trans. denied*, and Wife relies upon *Hughes v. Hughes*, 601 N.E.2d 381 (Ind. Ct. App. 1992), *trans. denied*. Both *Kendrick* and *Hughes* have facts similar to those before us, but neither is entirely identical. In *Kendrick*, the trial court ordered the husband to pay the wife an equalization payment of \$62,154.17, the majority of which represented the wife's half of the husband's pension as divided in the marital pot. 44 N.E.3d at 726. The husband argued the trial court abused its discretion when it ordered him to pay the amount in monthly \$500 installments because he had yet to receive his pension. *Id.* at 727.

³ In his brief, Husband states the trial court's alleged abuse of discretion "is only exacerbated by the assessment of interest at the rate of 8% per annum[.]" (Br. of Appellant at 21), however, he does not make a cogent argument or cite statutes or precedent to support his statement. To the extent he argues the trial court abused its discretion when it ordered him to pay 8% interest on the judgment amount of \$160,154.00, such argument is waived. See *Crider v. Crider*, 15 N.E.3d 1042, 1071-2 (Ind. Ct. App. 2014) (failure to make a cogent argument results in waiver of that argument), *trans. denied*.

[19] Our court explained the different ways the trial court could order the payment of the equalization payment:

Under the immediate offset method, the court determines the present value of the retirement benefits and awards the non[-]owning spouse his or her share of the benefits in an immediate lump sum award of cash or property equal to the value of his or her interest. Under the deferred distribution method, the court makes no immediate division of the retirement benefits but determines the future benefits to which the non[-]owning spouse is entitled. Traditionally, the benefits have been stated as a share of the owning spouse's future benefit, and payment can be made directly to the non[-]owning 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 726-7. The *Kendrick* court noted the wife had few assets, the husband's pension was reasonably secure, and the husband did not have sufficient other tangible property he could use to pay the equalization payment. *Id.* at 727. With consideration of the immediate offset and deferred distribution, and the combinations thereof, along with the circumstances of the parties, our court held the trial court did not abuse its discretion when it ordered the husband to pay the wife monthly installment payments of \$500 until he had paid the entire \$62,154.17 equalization payment. *Id.*

[20] Similarly, in *Hughes*, the husband appealed the trial court's order that he pay the wife monthly installment payments of \$800 until he turned sixty-two years old and, if he continued employment after sixty-two years old, he was to pay wife \$513.37 per month, based on the amount of pension benefits he would receive in those respective time frames. 601 N.E.2d at 382-3. The husband argued the trial court's order was "not just or proper in light of [the husband's] financial circumstances" because his yearly salary was primarily consumed with the trial court's assignment of a large portion of the marital debt. *Id.* at 384. We rejected that argument, noting the husband's argument ignored the fact that he also received a large asset as part of the property distribution that would essentially equal the debt he was also assigned. *Id.* Therefore, our court held

the trial court did not abuse its discretion when it ordered the husband to make installment payments because “[i]t is within the parties’ discretion to retain the assets they were awarded or to liquidate them in order to meet their financial obligations.” *Id.*

[21] Here, like in *Kendrick* and *Hughes*, the equalization payment of \$146,254 is roughly the same as Wife’s share of Husband’s pension. Applying the factors set forth in those cases, we note Wife is gainfully employed and Husband is currently on administrative leave due to an alleged criminal act committed against Wife. Wife retained the marital residence, and Husband lived with his parents at the time of the final hearing. During the pendency of the proceedings, Husband refused multiple discovery requests and ignored court orders to produce certain documents on a regular basis. Husband did not pay the ordered provisional maintenance to Wife on a regular basis, causing Wife to file two requests to for the trial court to find Husband in contempt for failure to pay maintenance.⁴

[22] Regarding Husband’s ability to pay the equalization payment, we note the trial court awarded him seventeen vehicles ranging in value from \$800 to \$38,000, five trailers, three motorcycles, and a mower worth \$14,808. Sale of the vehicles alone would give Husband sufficient funds with which to pay a substantial percentage of the equalization payment. The trial court also set

⁴ The trial court did not grant these requests but mentioned them in the final order.

aside to Husband from the marital pot four real estate properties that also could be liquidated. Husband has the discretion to retain those assets the trial court awarded him or liquidate them for payment of debt. *See Hughes*, 601 N.E.2d at 384. Therefore, the trial court did not abuse its discretion when it ordered Husband to pay Wife an equalization payment of \$146,254.00. *See Qazi v. Qazi*, 546 N.E.2d 866, 872 (Ind. Ct. App. 1989) (trial court did not abuse its discretion when it ordered the husband to pay the wife \$525,000.00 over a ten-year period because there were sufficient assets to meet that obligation), *trans. denied*.

Conclusion

[23] The trial court did not abuse its discretion when it set aside the Old Style Tavern's assets and liabilities to Husband. Additionally, the trial court did not abuse its discretion when it divided the remaining marital pot equally between the parties. Finally, the trial court did not abuse its discretion when it ordered Husband to pay Wife an equalization payment of \$146,254.00. Accordingly, we affirm the trial court's order regarding property distribution.

[24] Affirmed.

Bailey, J., and Robb, J., concur.