MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Carol Straub,
Appellant-Respondent,

v.

Debra Ford,
Appellee-Petitioner.

September 15, 2022

Court of Appeals Case No. 21A-DC-2762

Appeal from the Vanderburgh Superior Court

The Honorable Les C. Shively, Judge

Trial Court Cause No. 82D01-2012-DC-1319

Robb, Judge.

Case Summary and Issues

[1] Carol Straub and Debra Ford sought to dissolve their marriage. Following a hearing, the trial court issued an Order Regarding Division of Marital Assets. Straub now appeals, raising multiple issues for our review which we restate as: (1) whether the trial court abused its discretion in denying Straub's request for a continuance of the final hearing; (2) whether the trial court abused its discretion in dividing Straub's retirement assets; and (3) whether the trial court miscalculated the amount of Straub's 401(K) that is subject to division. We conclude the trial court did not abuse its discretion in denying Straub's motion to continue or dividing Straub's retirement assets. However, there is a discrepancy in the trial court's calculation of the amount of Straub's 401(K) that is subject to division. Therefore, we affirm in part and reverse and remand in part.

Facts and Procedural History

[2] Straub and Ford began living together in 1998. While they were cohabitating, Ford gave birth to two children. Straub adopted both children at birth. In 2014, Straub and Ford got married.[1] On December 30, 2020, Ford filed a petition to

[1] There is conflicting evidence in the record regarding when Straub and Ford got married. The petition for dissolution states that the pair were married in 2016 but testimony at the final hearing and the trial court's order state 2014 is the correct year. *Compare* Appellant's Appendix, Volume II at 17 *with* Transcript, Volume II at 164; Appealed Order at 2. However, because we conclude the coverture formula should include the cohabitation period, the specific date Straub and Ford were married is irrelevant.

dissolve her marriage to Straub. Subsequently, the trial court entered a provisional order granting the parties joint legal custody and Straub primary physical custody of the children. Further, the trial court noted that Straub would move back into the marital residence with the children and Ford would pay no child support due to her level of income. The trial court also issued a temporary retraining order, preventing "both parties from selling, transferring, encumbering, concealing or otherwise disposing of any marital assets[.]" Appellant's Appendix, Volume II at 57.

[3] On July 14, 2021, the trial court signed an Agreed Entry as to the Value of Property showing the parties agreed the marital residence had a value of $175,000. That same day, Straub's attorney sought permission to withdraw from the case pursuant to Straub's request.[2] *See id.* at 100-02. Attached to the motion to withdraw is a text message from Straub to her attorney stating:

> [P]er our phone call at 1:10 p.m. when I told you I did not need your services anymore[.]

Id. at 103. A final hearing in the case was set for July 28.

[4] On July 27, 2021, Mark Phillips entered an appearance on behalf of Straub, but conditioned his representation on the final hearing being continued. On July 28,

[2] This was the third attorney to withdraw from representing Straub during the proceedings. *See id.* at 34-35, 70-71.

at the outset of the final hearing, Straub requested a continuance which the trial court denied. Phillips withdrew his appearance and Straub proceeded pro se.

[5] On September 23, 2021, the trial court issued an order allowing the parties to present new evidence regarding the acquisition dates of property. *See id.* at 11. On October 25, 2021, the trial court issued its decree dissolving the marriage and on November 10, 2021, the trial court entered its Order Regarding Division of Marital Assets. The trial court concluded:

> Given the long term nature of the relationship and the factors cited, the Court finds no basis to deviate from a 50/50 division. The Court also concludes that the entire time period of the cohabitation shall be utilized in determining the marital estate.

Appealed Order at 2. The trial court then divided the marital assets, including Straub's monthly pension and 401(K) account.

[6] Straub receives a monthly pension benefit through her prior employment of $1,092. The trial court determined that 66.7% of this monthly pension should be considered a marital asset. The trial court determined Ford was entitled to 50% of the marital portion, or $366 per month.

[7] Next, the trial court determined that Straub's 401(K) had a date of filing value of $288,255.07, and that $198,175 was included in the marital estate and subject to division. Ultimately, the trial court granted Ford $156,000 of Straub's 401(K):

> [That amount includes] 50% of that portion of [Straub's] 401(K) in the marital estate plus an equalization payment which takes into consideration [Ford's] interest in the marital residence, the vehicles, personal property, the cash value of [Straub's] life insurance policy, as well as a balancing of the [financial] accounts of the parties.

Id. at 5. The trial court also attached and incorporated a "Cohabitation Marital Balance Sheet" as Exhibit D. *Id.*

[8] Straub now appeals. Additional facts will be presented as necessary.

Discussion and Decision[3]

I. Motion to Continue

A. Standard of Review

[9] The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. *Litherland v. McDonnell*, 796 N.E.2d 1237, 1240 (Ind. Ct. App. 2003), *trans. denied.* We will reverse the trial court only for an abuse of that discretion. *Id.* A trial court abuses its discretion when it reaches a conclusion which is clearly against the logic and effect of the facts or the reasonable and probable deductions which may be drawn therefrom. *F.M. v.*

[3] We note that Ford has failed to file an appellee's brief. "In such a case, we need not undertake the burden of developing arguments for the appellee." Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse the trial court if the appellant establishes prima facie error. *Id.* Prima facie is defined as "at first sight, on first appearance, or on the face of it." *Id.* (citation omitted).

N.B., 979 N.E.2d 1036, 1039 (Ind. Ct. App. 2012). "An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion." *Rowlett v. Vanderburgh Cnty. Off. of Fam. & Child.*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied.* However, no abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial. *Litherland*, 796 N.E.2d at 1240.

B. Denial of Continuance

[10] Straub argues the "trial court abused its discretion and violated [her] right to due process when it denied her request for a continuance[.]" Brief of Appellant at 14. In determining whether a denial of a continuance violates due process, "[t]here are no mechanical tests[.]" *Smith v. Smith*, 136 N.E.3d 656, 659 (Ind. Ct. App. 2019) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)). "The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request [is] denied." *Id.*

[11] The "unexpected and untimely withdrawal of counsel does not necessarily entitle a party to a continuance." *F.M.*, 979 N.E.2d at 1040. Under certain circumstances, however, the withdrawal of counsel can constitute good cause for a continuance if the moving party is free from fault and the party's rights are likely to be prejudiced by the denial. *See id.* (citation omitted); *see also Hess v. Hess*, 679 N.E.2d 153, 155 (Ind. Ct. App. 1997) ("Although we cannot say that Husband is wholly free from fault for his counsel's withdrawal, we similarly

cannot say that, in dissolution proceedings where emotions run high, attorney-client disagreement and conflict are unique.").

[12] Straub relies on this court's decision in *Smith*; however, we find the case at hand distinguishable. In *Smith,* the husband's attorney filed a motion to withdraw *one day* before the final hearing. The trial court denied the husband's request for a continuance and the husband had to proceed pro se. This court reversed the trial court's decision, finding that the husband "demonstrated good cause" for a continuance because (1) there was no evidence the husband was attempting to prolong the proceedings; (2) the dissolution hearing was held a mere four months after the petition for dissolution was filed; (3) the husband had surgery two weeks prior to the hearing and his attorney had yet to provide him with his documents to proceed with the dissolution; and (4) the husband's attorney withdrew the day prior to the hearing. *Smith*, 136 N.E.3d at 659.

[13] Here, the circumstances differ from *Smith*.[4] First, Straub voluntarily dismissed her attorney two weeks prior to the final hearing and failed to secure new counsel as opposed to the situation in *Smith* where the attorney withdrew one day prior to the hearing. Second, although we do not believe that Straub's failure to secure an attorney in those two weeks was an attempt to prolong the proceedings, the final hearing took place seven months after the petition for

[4] Straub points to Ford's request for a continuance of the final hearing date as support for her own motion for continuance. However, Ford's motion for continuance was based on Straub's failure to deliver requested discovery, so Straub's contention that Ford had delayed the proceedings more than her is misplaced.

dissolution was filed and the trial court noted it would be unable to reschedule the hearing in 2021 based on its calendar. *See* Tr., Vol. II at 85. Third, Straub did not have any issue arise close to the date of the hearing that would be analogous to the *Smith* husband's surgery. Last, although Straub argues that she was "unprepared and without documentation[,]" Br. of Appellant at 24, the trial court made sure to allow Straub to present evidence of assets and their valuations. *See* Tr., Vol. II at 85, 108-10. Therefore, we conclude that Straub failed to demonstrate good cause.

[14] Further, "[n]o abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial." *Smith,* 136 N.E.3d at 659. Straub presents no argument that any asset was valued incorrectly, does not allege any property was left out of the marital estate, and does not articulate any argument that the presumption of an equal split of the marital estate should have been disregarded. Accordingly, we conclude that Straub has failed to show that she was prejudiced by the trial court's denial of her motion to continue.

[15] We conclude the trial court did not abuse its discretion denying Straub's motion to continue.

II. Division of Marital Assets

A. Standard of Review

[16] The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1191 (Ind. Ct. App. 2001). When a trial court enters findings of

fact and conclusions of law pursuant to Trial Rule 52, we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. *Hazelett v. Hazelett*, 119 N.E.3d 153, 157 (Ind. Ct. App. 2019). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

[17] When a party challenges the trial court's division of marital property, she 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 may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. *In re Marriage of Dall*, 681 N.E.2d 718, 720 (Ind. Ct. App. 1997). In dissolution proceedings, the trial court is required to divide the property of the parties "in a just and reasonable manner[.]" Ind. Code § 31-15-7-4(b). This division of marital property is a two-step process. *O'Connell v. O'Connell*, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008). First, the trial court must ascertain what property is to be included in the marital estate; second, the trial court must fashion a just and reasonable division of the marital estate. *See id*. at 10-11.

B. Premarital Cohabitation

[18] Straub argues the trial court erred by basing the division of her pension and 401(K) on the length of the parties' cohabitation rather than the length of their marriage. Specifically, Straub challenges the trial court's use of the cohabitation period when implementing the coverture formula. The coverture formula

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

Hardin v. Hardin, 964 N.E.2d 247, 250 (Ind. Ct. App. 2012) (citation omitted) (emphasis omitted).

[19] In this case the trial court used a coverture factor of 20/30, which took into consideration twenty years of cohabitation divided by thirty years of accrual time. We have held that "cohabitation can be a basis for distribution of assets under contractual and equitable principles." *Chestnut v. Chestnut*, 499 N.E.2d 783, 786-87 (Ind. Ct. App. 1986) ("It would be against public policy to ignore [wife's] contribution during the period prior to marriage since she and [husband] eventually married.").[5] However, Straub argues that using the length

[5] We note that as a same sex couple, Straub and Ford were legally precluded from marrying until 2014, which coincides with their period of cohabitation.

of cohabitation for the coverture formula is inappropriate here because "there is simply no evidence in the record that [Ford] at all contributed financially or as a care giver to the children in any meaningful way during cohabitation." Br. of Appellant at 30.

[20] When questioned, Ford testified that she did contribute to the parties' bills. *See* Tr., Vol. II at 91. Further, Ford birthed two children adopted by Straub and "their agreement [was Ford] would stay home with the children." Appellant's App., Vol. II at 42. Straub merely asks us to reweigh the evidence, which we will not do. *In re Marriage of Dall*, 681 N.E.2d at 720. We conclude the trial court did not abuse its discretion when it considered Ford's contributions during the parties' cohabitation in dividing the marital assets.

III. 401(K) Subject to Division

[21] Straub argues the trial court miscalculated the amount of her 401(K) to be included in the marital estate and subject to division.[6] The trial court's order states that Straub's 401(K)

> has a date of filing value of $288,255.07 . . . [and a]pplying 20 years of cohabitation divided by 30 years of [Straub's] service results in $198,175 of the 401(K) being in the marital estate subject to distribution between the parties.

[6] Straub also argues that the incorporated and attached Exhibit D contradicts the body of the trial court's order. We agree. Monetary values in Exhibit D do not match those in the body of the order. Therefore, Exhibit D need not be attached to the trial court's order pursuant to the instructions in this section.

Appealed Order at 5. This calculation does appear to be incorrect. Dividing the twenty years of cohabitation by the thirty years of service gives a coverture factor of .667. Then, multiplying the date of filing value ($288,255.07) by the coverture factor gives $192,266.13 as the correct amount of Straub's 401(K) subject to distribution.

[22] Accordingly, we reverse and remand with instructions for the trial court to issue an order either explaining or correcting this discrepancy and adjusting the marital property division accordingly. No further hearings are necessary.

Conclusion

[23] We conclude the trial court did not abuse its discretion in denying Straub's motion to continue or dividing Straub's retirement assets. However, there is a discrepancy in the trial court's calculation of the amount of Straub's 401(K) that is subject to division. Therefore, we affirm in part and reverse and remand in part with instructions.

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

Pyle, J., and Weissmann, J., concur.