

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Douglas Brough,
Appellant-Respondent,

v.

Virginia Brough,
Appellee-Petitioner.

March 17, 2021

Court of Appeals Case No.
20A-DN-1376

Appeal from the Morgan Circuit
Court

The Honorable Matthew G.
Hanson, Judge

Trial Court Cause No.
55C01-1910-DN-2046

Altice, Judge.

Case Summary

- [1] Following the dissolution of his marriage to Virginia Brough, Douglas Brough appeals the trial court's property division of their marital estate. He asserts that the court clearly erred in two respects, both of which concern his pension,

namely by failing to include in the marital estate a survivor's benefit that the parties had elected for Virginia to receive and by awarding Virginia seventy percent of the pension that accrued during the period of their marriage.

[2] We affirm.

Facts & Procedural History

[3] The parties married on May 1, 2001, when each of them was in their mid-forties. They had no children together. For a period of time in her life, Virginia worked for an airline company as a maintenance coordinator, then as a substitute teacher, and then for the YMCA in the after-school program.

Around 2011, she began working part-time for the Town of Monrovia as an administrative coordinator, where she remained employed as of the final hearing in 2020.

[4] Throughout his life and during the marriage, Douglas was employed as a skilled carpenter. He became a member of the Indiana Carpenters Union (the Union) in October 1977. As part of his employment and membership in the Union, Douglas earned a pension benefit through the Indiana Carpenters Pension Fund.

[5] On October 10, 2010, Douglas and Virginia executed a Form of Payment Election (Election Form), in which Douglas, the participant, elected a "Joint and 75% Survivor Benefit" (75% Survivor Benefit). Specifically, he marked the following as his choice:

I elect the Joint and 75% Survivor Benefit[.] (**Attach a copy of the marriage certificate and Proof of Spouse's Age**) I wish to have my pension payable in the form of a Joint and 75% Survivor benefit wherein after my death, my spouse, if surviving, will receive a monthly pension for the remainder of my spouse's life. The amount of my spouse's pension will be three-quarters (75%) of the amount of the pension during my lifetime.

Appellant's Appendix at 36 (emphases in original). Douglas acknowledged that he had been given "a written explanation of the approximate amount of payment under the . . . 75% Survivor Benefit[.]" *Id.* He also agreed:

I understand that I retain the right to change my election by filling out a new election form at any time prior to my pension starting date, but that after benefit payments begin this election cannot be change [sic].

Id. On November 1, 2010, Douglas retired, and he began receiving monthly pension benefits. Pursuant to his election of the 75% Survivor Benefit, his pension benefit was reduced by \$420.15 per month.

[6] On October 20, 2019, Virginia filed a petition for dissolution of marriage. On May 22, 2020, the trial court held a final hearing. Virginia and Douglas, age sixty-five and sixty-six, respectively, were the only witnesses to testify. Each presented testimony and evidence concerning various assets and debts of the marriage and made requests to the court as to property division. As to their marital residence in Mooresville, Indiana, Virginia presented an appraisal that valued the residence at \$160,000, and Douglas presented an appraisal that valued the residence at \$120,000. The home had an existing mortgage on it at

the time of filing in the amount of \$81,454.53. Neither party presented any valuation evidence concerning the pension.

[7] As to income and employment, Virginia testified that, during the marriage, Douglas was the primary wage earner. As of the hearing, she was working twenty hours per week for the Town of Monrovia, had been there nine years, and, after taxes, made approximately \$400 every two weeks. She stated that after his retirement, Douglas began receiving a pension of approximately \$3000 per month and that, although he was retired, Douglas still did carpentry work on an as-needed basis for a company called Aries Interiors. She presented 1099s for Douglas that showed Aries paid him \$11,272 in 2017, \$6860 in 2018, and \$14,099 in 2019. She testified that, additionally, Douglas independently performed “side business” doing carpentry work for people for which he was paid by cash or check, and such was not reflected in a W-2 or 1099. *Transcript* at 25. She said the amount of side-work varies from year to year, but characterized it as “quite a bit,” with Douglas earning \$14,000 one year and about \$20,000 another. *Id.* She offered and the court admitted without objection W-2 forms and 1099 forms for her and for Douglas.

[8] Virginia testified that at her age and skill level, she was not going to be able to find a job that paid her what Douglas earned as a skilled carpenter. Virginia further testified that she was married to Douglas for approximately one-third of his Union career, and she asked the court to award her eighty percent of the pension benefits that accrued during the period of the marriage to account for

the disparity in their incomes and assist her with supporting herself after the dissolution.

- [9] Douglas testified that, being sixty-six years old, he was not sure how much longer he could continue to do carpentry work because it is physically demanding, and he indicated that he had to turn down work on occasion because of issues with his back. With regard to the pension, Douglas testified that, beginning in November 2010 when he started to receive pension benefits, and continuing to the present, his monthly payment had been reduced by \$420.15. He testified that the \$420.15 represented 25% of his monthly pension benefit. Douglas explained:

I've not received \$420.15 a month since I signed the seventy-five percent survivorship. It's a onetime [sic] deal. Once you and your wife sign it, that's the end of it. And if there's a divorce, then, I still only get the same amount that I'm getting now, which is still \$420.15 a month less. And that's going to happen the rest of my life. So if I've lost \$50,000, or if we have lost \$50,000 to ten years, which is not quite \$50,000, the next ten years I'm going to lose \$50,000. And if I live twenty years, I'm going to lose another \$50,000.

Id. at 71. Douglas opposed Virginia's request for eighty percent of the pension that accrued during the course of the marriage. When Douglas was asked what he thought Virginia should receive in terms of the pension, his reply was "[n]othing." *Id.* at 76.

- [10] Throughout the hearing, there was discussion among counsel and the court regarding the pension and the 75% Survivor Benefit. Specifically, there was

discussion as to whether, after the marriage was dissolved, the \$420.15 monthly deduction would continue and Virginia would receive the 75% portion of Douglas's monthly pension if Douglas predeceased her. The trial court stated that it specifically needed to know whether the 75% Survivors Benefit "survives the divorce or not[,]” and each counsel stated that he did not know. *Id.* at 43. The court instructed, “You guys are going to have to do some research on this with the [pension] and how they do it.” *Id.* The court continued,

Sometimes there's very rare pensions that actually do contemplate divorce, but most of them if a divorce occurs essentially that right goes away. So you guys can still look for something that tells me I'm wrong on that, but I think that's the way that plays out. So because obviously if he got remarried to somebody else, they would still have that preserved preservation [sic] for the next spouse as well.

Id. at 58. The court also stated:

My take on this is [] that the \$425 [sic] per month goes away, as does her right to take anything, once the divorce occurs. He has not died. They have just simply divorced. So I need some clarification on that from your end, Mr. Britton [counsel for Douglas], on what they are telling you through the pension company. If you've got paperwork to file, that's fine, go ahead and do it. But try to clarify that for me. Because my understanding is that the \$425 [sic] goes away when they're divorced. And then I can figure up percentages^[1] from there.

¹ The court stated that, if Virginia's death benefit terminated upon divorce, then it would apply a coverture formula to calculate her share.

Id. at 90. At the conclusion of the hearing, the court stated it would issue its decree after it received the pension information from Douglas's counsel.

[11] On June 5, 2020, the court issued the decree of dissolution (Decree) that divided the assets and debts nearly 50/50 between the parties. With regard to the pension, the court observed, "[T]he court provided two (2) weeks for either party to present written evidence regarding arguments made about the retirement plan of the husband and no one provided said evidence." *Appellant's Appendix* at 8. The court issued the following findings regarding the pension:

58) That the husband had a pension from approximately thirty years of work.

59) That the husband was only married to the wife for approximately nine (9) years of that period when he was earning this pension.

60) That the husband seeks to recover the costs he has been assessed since his retirement around 2010 to preserve the pension should he pass before wife.

61) The husband also claimed that this monthly deduction would continue even after the divorce, a contention that was challenged by this court.

62) That the husband was given two (2) weeks to support evidence on this argument and no further evidence was provided.

63) That the court finds that the monies deducted to preserve a right of survivorship during the marriage were costs of the

marriage and were not otherwise a debt/credit that can be recovered by husband in the divorce.

64) That the wife requests a distribution of the time period from which they were married until husband's retirement and requests a distribution greater than 50-50,

65) That after hearing evidence of husband's income, finding that he was substantially a greater earner during the marriage and even after his retirement, a slight modification in the standard 50-50 split is warranted.

Id. at 12. The court awarded Douglas's pension to him but ordered "wife shall prepare a QDRO reflecting that she shall receive 70% of the value of the pension from May 1, 2001 until the husband retired from his employment." *Id.* at 15.

[12] With regard to the marital residence, the court valued the residence at \$160,000 and awarded it to Douglas along with the mortgage. The court's findings in support stated that Virginia had presented an appraisal with a value of \$160,000 but that Douglas had estimated the home to be valued at \$120,000 but did not provide an appraisal at the final hearing.

[13] On June 17, 2020, Douglas filed a motion to correct error, claiming error in two respects: (1) the value assigned to the marital residence and (2) the division of the pension. Concerning the marital residence, Douglas argued that, contrary to the court's finding, he had presented an appraisal that was admitted as an exhibit, which valued the home at \$120,000. He asked the court to correct the

value of the home to \$120,000 or, alternatively, to \$140,000 “to split the difference between the appraisals.” *Id.* at 31.

[14] With regard to the pension, Douglas asserted that he had promptly requested information from the Pension Fund following the final hearing but it was not received until after the court issued its Decree. Douglas attached to his motion to correct error three documents: (1) his counsel’s May 22, 2020 letter to the Pension Fund requesting “policy information [for Douglas] showing what happens to the survivorship option in the event of the divorce”; (2) a letter from the Pension Fund sent to Douglas summarizing his benefits (Election Summary); and (3) the Election Form executed by Douglas and Virginia in October 2010. The Election Summary, although reflecting that it was mailed on June 12, 2020 in response to counsel’s request, appears to have been originally sent to Douglas at the time of his election in 2010, as it states, “We are pleased to inform you that your application for a pension benefit from the Pension Plan for the Indiana Carpenters Pension Fund has been approved,” and it directs him to save the letter for future reference. *Id.* at 34. The Election Summary reflects that Douglas chose the 75% Survivor Benefit and that, beginning November 1, 2010, he would begin receiving monthly pension checks in the gross amount of \$3259.30. It also stated:

If you have elected the . . . [75% Survivor Benefit] and your spouse predeceases you, your benefit will revert to the Single Life form of benefit. Upon receipt of your spouse’s death certificate, your benefit will be recalculated and the new amount will be payable as of the first of the month following the receipt of the death certificate. *Please note that if you are single at the time of*

retirement OR your spouse at the time of retirement dies or you divorce, you will not be able to assign a survivor benefit to any other future spouse.

Id. at 35 (emphases added). In his motion to correct error, Douglas asked the trial court “to recalculate [Virginia]’s portion of the pension” based upon [Douglas]’s testimony and the pension documents, which showed that, pursuant to the 75% Survivor Benefit election, Douglas “had forgone 25% of his pension that he will not recover[.]” *Id.* at 31.

[15] On June 27, 2020, the trial court issued an Amended Decree, granting the motion to correct error with regard to the house value, placing a value on the marital residence of \$140,000, but denying the request to change the division in the pension. As to the pension, the court found, in part:

6) That the husband also presented documents from his employer regarding his pension and those documents were apparently in transit when the court created the original [Decree].

7) The court reviewed the documents and find that they in fact say exactly what this court believed they would say.

8) That in fact the parties made a marital decision to dissipate an asset (the pension) for the benefit of the Wife should husband die.

9) As believed by this court, the employer made a contract with the husband and wife, which they signed and agreed to, that this was not modifiable, even upon a divorce of the parties.

10) That in other words, the parties made a marital decision which was permanent and they should not now be able to try and rescind a contract to which they were both parties.

11) Likewise, the husband should not be credited for a loss of that asset (certain pension amount) in the past or moving forward as he entered into the contract knowing full well that a divorce could always occur.

12) Similarly, should wife have died prior to husband, the same benefit would have been lost as it was paid over the marriage, but never came true since there would have been no survivor to benefit from the loss incurred by husband before wife might have died.

* * *

80) That the court finds that the monies deducted to preserve a right of survivorship during the marriage were costs of the marriage and were not otherwise a debt/credit that can be recovered by husband in the divorce.

Id. at 17-18, 22. The court denied the request “to have costs for the loss reimbursed from times during the marriage or moving forward.” *Id.* at 18.

[16] The court also denied Douglas’s request to modify the distribution of the portion of the pension that accrued during the time that the parties were married, which is nine and one-half years of Douglas’s thirty years, or “approximately 1/3 of the pension[.]” *Id.* at 18. The court determined that “at this time, without some distribution here, [Virginia] would have nothing unless and until [Douglas] would precede her in death[.]” and it ordered that “the split

as defined by the court, for the period of the marriage, shall remain as ordered.”

Id. Douglas now appeals.

Discussion & Decision

[17] Where, as here, the trial court enters findings and conclusions sua sponte, the findings control only with respect to the issues they cover, while a general judgment standard applies to issues on which there are no findings. *In re Marriage of Sutton*, 16 N.E.3d 481, 484-85 (Ind. Ct. App. 2014). We affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. *Hurt v. Hurt*, 920 N.E.2d 688, 691 (Ind. Ct. App. 2010). When the court has made findings of fact and conclusions thereon, we review those findings and conclusions using a clearly erroneous standard. *Sutton*, 16 N.E.3d at 485. A finding of fact is clearly erroneous when the record contains no facts to support the findings, either directly or by inference. *Hurt*, 920 N.E.2d at 691. “A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts.” *Id.* In conducting our review, we first determine whether the evidence supports the findings; then we determine whether the findings support the judgment. *Id.*

I. The 75% Survivor Benefit

[18] In dissolution actions, Indiana follows the “one pot” theory, meaning that all marital property is included in the marital pot for division, regardless of whether it was owned by one spouse before marriage, acquired by one spouse after the marriage and before final separation, or acquired through the joint

efforts of both. Ind. Code § 31-15-7-4(a); *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014). Douglas asserts that “the trial court failed to include the [75% Survivor Benefit] in the marital pot[,]” and it was error for the trial court not to consider “the value of the [75% Survivor Benefit]” when determining a just and reasonable division of the marital estate. *Appellant’s Brief* at 23, 27. He asks us to remand for the trial court to hear evidence regarding the present value of the 75% Survivor Benefit as of separation date so that the trial court consider that value in the division of the marital estate. For reasons explained below, we decline to do so.

[19] Initially, we observe that Douglas did not specifically ask the court at the final hearing to include the 75% Survivor Benefit in the marital estate. That is, he did not make any such request during his testimony, and his proposed division of the marital estate did not assign a value to the 75% Survivor Benefit or otherwise include it as something to be considered and divided. *See Respondent’s Exhibit A*. Furthermore, neither party presented any evidence as to the present value of the 75% Survivor Benefit, either at or following the final hearing. Indeed, neither party presented any valuation evidence about the pension at all.² On this record, Douglas has waived any claim that the trial court erred when it did not include the 75% Survivor Benefit in its calculations when distributing the marital estate. *See Campbell v. Campbell*, 993 N.E.2d 205, 215

² Although Douglas challenges the fact that the trial court’s distribution did not include the 75% Survivor Benefit, we note that it likewise did not include the value of Douglas’s pension, which was awarded to him (less the portion awarded via QDRO to Virginia).

(Ind. Ct. App. 2013) (finding that father waived challenge to unequal division of personal property where he did not present any evidence as to the value of the items), *trans. denied*; *Balicki v. Balicki*, 837 N.E.2d 532, 538 (Ind. Ct. App. 2005) (“[I]t has been held repeatedly that it is incumbent on the parties to present evidence of the value of property to the trial court, and that trial courts do not err in failing to assign values to property where no evidence of such value was presented.”), *trans. denied*; *In re Marriage of Church*, 424 N.E.2d 1078, 1081 (Ind. Ct. App. 1981) (holding that “any party who fails to introduce evidence as to the specific value of the marital property at the dissolution hearing is estopped from appealing the distribution based on that absence of evidence”).³

II. Division of Marital Portion of Pension

[20] Douglas also appeals the court’s division of his pension, asserting that the court equally divided “all of the marital property *except* the marital portion of

³ While we have determined that the issue is waived, we note our disagreement with Douglas’s claim that the court’s failure to include the 75% Survivor Benefit in its calculations was based on a “misreading” of the Election Form. *Appellant’s Brief* at 28. Douglas suggests that the court was operating on the misconception that the \$420.15 monthly reduction, along with Virginia’s right to receive the benefit, ceases upon divorce, when, in fact, the Pension documents show otherwise. We acknowledge that the court made statements at the final hearing indicating that it anticipated that the monthly \$420.15 deduction and Virginia’s right to receive the benefit would terminate upon dissolution and then, in the Amended Decree, it stated that the later-submitted pension documents “say exactly what this court believed they would say.” *Appellant’s Appendix* at 17. However, a full reading of the Amended Decree illustrates that the court understood that the \$420.15 per month continued after dissolution and the previously-made election for the 75% Survivor Benefit could not be changed. Specifically, the court found in the Amended Decree that (1) the parties had made a decision during the marriage “to dissipate an asset (the pension) for the benefit of [Virginia],” (2) they signed a contract that “was not modifiable, even upon a divorce of the parties[.]” and (3) Douglas “should not be credited for a loss of that asset . . . in the past or moving forward[.]” *Id.* at 17-18 (emphasis added). We are thus convinced that the court’s division of the estate was not based on a misreading of the Election Form.

Douglas’s pension[.]” and it was an abuse of discretion for the court to deviate from the presumptive equal split of that property. *Appellant’s Brief* at 30 (emphasis added). The division of marital property is within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. *Kendrick v. Kendrick*, 44 N.E.3d 721, 724 (Ind. Ct. App. 2015), *trans. denied*. An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. *Id.* When we review a claim that the trial court improperly divided marital property, we must consider only the evidence most favorable to the trial court’s disposition of the property. *Id.* Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. *Id.*

[21] Pursuant to Ind. Code § 31-15-7-5, the trial court shall presume that an equal division of the marital property is just and reasonable. However, that presumption may be rebutted by evidence that an equal division would not be just and reasonable, such as evidence concerning the economic circumstances of each spouse at the time the disposition of property is to become effective and the earnings or earning ability of the parties. I.C. § 31-15-7-5(3), (5). Thus, a trial court may deviate from an equal division so long as it sets forth a rational basis for its decision. *Kendrick*, 44 N.E.3d at 724. A party who challenges the trial court’s division of marital property must overcome a strong presumption that the court considered and complied with the applicable statute. *Id.* Thus,

we will reverse a property distribution only if there is no rational basis for the award. *Id.*

[22] Here, at the final hearing, Virginia requested that the court award her eighty percent of the value of Douglas’s pension that accrued during their marriage to account for the disparity in the parties’ incomes, whereas Douglas stated that in his opinion she should be awarded none of it. The Amended Decree awarded the pension to Douglas but ordered that Virginia would receive by means of a QDRO “70% of the value of the pension” from May 1, 2001 (the date of marriage) to the date of Douglas’s retirement in November 2010. *Appellant’s Appendix* at 25. The trial court determined that a deviation was warranted because, “after hearing evidence of husband’s income,” the court found that Douglas “was substantially a greater earner during the marriage and even after his retirement[,]” and without some distribution from his pension, Virginia “would have nothing unless and until [Douglas] would precede her in death.” *Id.* at 18, 23. On appeal, Douglas suggests that, contrary to the court’s finding, there was only a “minor difference” between the parties’ current earnings. *Appellant’s Brief* at 31. We disagree.

[23] Although Douglas maintains that the evidence at the final hearing showed that Virginia earns \$24,000 per year and Douglas earns approximately \$32,000 per year, that income figure for Douglas entirely leaves out his pension, which is over \$3000 per month. According to their recent joint tax returns, their adjusted gross income (AGI) was \$89,969 in 2017 and \$84,709 in 2018, with Virginia’s income comprising approximately \$24,000 of the AGI each of those

years and the remainder representing Douglas's income. We recognize that, at age sixty-six, Douglas may not be able to continue with the physically-demanding carpentry work. However, the record shows that his social security income is almost double that of Virginia's,⁴ and Douglas receives a monthly pension of approximately \$3000. Douglas has failed to show that the trial court's decision to deviate from the presumptive equal division and award Virginia seventy percent of the pension that accrued during the period of marriage was an abuse of discretion.

[24] Judgment affirmed.

Mathias, J. and Weissmann, J., concur.

⁴ Virginia's SSA-1099s show that her annual benefits were \$9995 in 2017 and \$10,199 in 2018; Douglas's were \$20,028 in 2017 and \$20,424 in 2018.