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IN THE COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
	)	
R.B.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 18A02-1010-DR-1163
	)	
M.B.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0907-DR-82

August 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

R.B. ("Husband") appeals from the trial court's division of marital property and custody determination in the dissolution of his marriage to M.B. ("Wife"). Husband raises three issues, which we revise and restate as:

I. Whether the trial court's findings and conclusions regarding the custody of B.B. were clearly erroneous;

II. Whether the trial court's findings and conclusions regarding the division of the marital estate were clearly erroneous; and

III. Whether the trial court abused its discretion in awarding appellate attorney fees to Wife.

We affirm.

The relevant facts follow. Husband and his brother inherited two farm properties ("the Farm") from their father. In June of 1991, Husband obtained a mortgage and bought his brother's portion of the land, which resulted in Husband's full ownership of the Farm. On July 29, 1991, Husband transferred the Farm into a revocable trust ("the Trust") with the intent to ensure its passage within his family upon his death in accordance with the trust directives.[1]

Husband and Wife were married on November 19, 1992, and they moved into a house on the Farm on March 9, 1996. During their marriage they had one child, B.B. Husband rents the Farm's acreage to other farmers to pay the Farm's mortgage and has done so since he acquired the Farm.

The parties maintained a separate banking account (the "Farm Account") into which the cash rent funds were deposited and from which Farm-related debts including

[1] R.B. later amended the Trust to add M.B. as a successor trustee and a conditional beneficiary.

the mortgage were paid. The parties also held a separate joint banking account into which the parties' personal income was deposited and from which all bills unrelated to the Farm were paid. On occasion, excess cash from the cash rent contracts was transferred into the parties' joint banking account.

During the marriage, Wife helped Husband do remodeling, painting, and electrical work on the Farm. These improvements were mostly funded by the Farm Account, but at times funds from the parties' joint banking account were used as well. The value of the Farm was estimated to have increased from approximately $289,700, at the time of the parties' marriage, to a value of $1,037,000 in 2010, and the Farm was the most significant asset in the marital estate.

On July 20, 2009, Wife filed a petition for dissolution of marriage and a final hearing was held on June 14, 2010 in which the parties' marriage was dissolved but the disputed issues were set off for future hearing. On August 23, 2010, the parties participated in a clinical session conducted by psychologist Dr. Angela D. Lykins, who issued a report containing parenting time recommendations. According to the report, B.B. "continues mostly to hold onto negative views of his father" and "the forced visitation issue would halt future growth for their relationship." Petitioner's Exhibit 1 at 7. Dr. Lykins recommended weekly phone calls and monthly joint counseling sessions for one year between Husband and B.B. to strengthen their relationship because "the idea of forcing [B.B.] to visit his father according to the Indiana Parenting Time Guidelines does not seem to be in [B.B.]'s best interest." Id.

The report also stated concerns that the post-separation relationship between Husband and Wife "proves somewhat less than optimal in fostering [B.B.'s] development." Id. To rectify their lack of effective communication, Dr. Lykins recommended the parties attend monthly counseling for a year. The report also included a recommendation to reevaluate parenting time at the completion of the counseling with the progress of each participant being a significant factor in the reevaluation analysis.

On September 7, 2010, the trial court held a hearing on the disputed custody and asset issues. Husband offered testimony that he was in agreement with Wife's testimony as to the custodial arrangements for B.B. Specifically, Husband testified that he agreed with the arrangement that Wife would have legal and physical custody of B.B. subject to his entitlement to information about the education and medical expenses of B.B., that he would not pick up B.B. from school unless there was an emergency requiring him to do so, that his parenting time would be limited to ten-minute weekly phone calls from B.B. on Wednesday nights, and that he agreed to comply with Dr. Lykins's recommendations.

Wife testified that she was responsible for sending out bill payments; however, she had not made payments on her school loans which caused the amount owed to increase to $95,012 due to late penalties and fees. Husband testified that he was unaware of Wife's school debt before the divorce proceedings.

The court entered findings of fact and conclusions of law on September 30, 2010, pursuant to Husband's request under Ind. Trial Rule 52(A). Parenting time of B.B. was granted consistent with Dr. Lykins's clinical report and recommendations. Wife was held solely responsible for paying her entire student loan balance which constituted the

majority of her debt in the martial estate valuations. The court noted that Husband "did not protect his interest in [the Farm] by a pre-nuptial agreement," and that it "appreciated by $747,300.00 during the marriage, and about $630,000.00 if you factor in the mortgage debt on" the Farm. Appellant's Appendix at 17. The court found that Husband had rebutted the presumption of an equal division because he brought the Farm into the marriage, and ordered a "67%/33%" split in Husband's favor. Id. at 24. This division shared some of the Farm's appreciated value with Wife because the parties had a lengthy marriage which produced a child and also because Husband "did not assist Wife in paying off her student loan debts." Id. Thus, the court found, "It would be grossly unfair for Husband to take virtually all the assets and leave Wife with debt." Id.

In its order, the court assigned assets to Wife totaling $10,268 and to Husband totaling $1,066,559, for a total gross estate value of $1,076,827. The court assigned debts to Wife totaling $108,663, which consisted mostly of her student loan debt, and to Husband debts totaling $131,640 for a total marital debt of $240,303. Thus, the court determined the net estate to be valued at $836,524. The court therefore awarded thirty-three percent of the net estate, or $267,053, to Wife and sixty-seven percent, or $560,471, to Husband and ordered Husband to pay $374,448 to Wife to effectuate her share of the estate.

On October 28, 2010, Husband filed his notice of appeal. The following day, Wife filed a Motion to Correct Error and a Request for Pre-Appeal Attorney Fees and Costs. On December 29, 2010, this court ordered the consolidation of "all pending matters into [this] instant appeal" and "remanded to the jurisdiction of the trial court for

the entry of an order on [Wife's] motion to correct error and request for pre-appeal attorney fees . . . ." December 29, 2010 Order. On January 4, 2011, the trial court entered its Order After Remand to Trial Court on Motion to Correct Errors and Request for Pre-Appeal Attorneys Fees (the "Order After Remand") and awarded Wife $3,500 in appellate attorney fees.

I.

The first issue is whether the trial court's findings and conclusions regarding the custody of B.B. were clearly erroneous. Generally, when, as here, a trial court enters findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A), we apply a two-tiered standard of review; first we determine whether the evidence supports the findings, and second, whether the findings support the judgment. Davis v. Davis, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008). We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage–MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). We give due regard to the trial court's ability to assess the credibility of witnesses. Menard, 726 N.E.2d at 1210. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

Also, a trial court's custody determination is afforded considerable deference as it is the trial court that sees the parties, observes their conduct and demeanor and hears their testimony. Kondamuri v. Kondamuri, 852 N.E.2d 939, 945-946 (Ind. Ct. App. 2006). Thus, on review, we will not reweigh the evidence, judge the credibility of witnesses or substitute our judgment for that of the trial court. Id. at 946. We will reverse the trial court's custody determination only if it is clearly against the logic and effect of the facts and circumstances or the reasonable inferences drawn therefrom. Id.

Husband argues that he is entitled to parenting time with B.B., which was not given to him by the trial court. He also argues that the "trial court impermissibly delegated to Dr. Lykins the ability to determine parenting time." Appellant's Brief at 14. Husband further contends that the lack of parenting time interferes with his fundamental right to rear B.B.

However, we find that Husband failed to previously raise these arguments and testified at the hearing that he agreed to all of the parenting time terms. Specifically, at the September 7, 2010 hearing, the following colloquy occurred:

> [Husband's Counsel]: . . .With regard to your son, [B.B.], what [Wife] has testified to, and I want to make sure this is your agreement as well, is that she will have – she'll have physical and legal custody of your son, subject to you being entitled to have information about his education and his medical expenses, is that correct?
>
> [Husband]: Yes.
>
> [Husband's Counsel]: Okay. That you're not going to go pick him up from school unless called on an emergency basis by the school to do so?

[Husband]: Yes.

[Husband's Counsel]: That you're going to have telephone contact with him every Wednesday at 9:00 p.m. for a ten (10) minute phone call?

[Husband]: Yes.

[Husband's Counsel]: And [B.B.]'s going to call you for that phone call?

[Husband] Yes.

* * * * *

[Husband's Counsel]: Now you also have had an opportunity to review Dr. Lykins's report?

[Husband]: Yes.

[Husband's Counsel]: And you're willing to comply with her recommendations?

[Husband]: Yes.

[Husband's Counsel]: And you're agreeing that you and [B.B.] would have one (1) session per month for twelve (12) months?

[Husband]: Yes.

[Husband's Counsel]: And that you and [Wife] would have one (1) session for twelve (12) months to try and work on your communication as parents?

[Husband]: Yes.

Transcript at 68-69.

Thus, Husband agreed to terms regarding parenting time that were consistent with Dr. Lykins's report. Husband also agreed to further recommendations regarding

parenting time and custody issues at the conclusion of the recommended counseling. Specifically, when asked if Husband agreed that, after twelve months of counseling, Dr. Murray could "make further recommendations on what should happen going forward," Husband replied: "Yes." Id. at 72-73.

We conclude that Husband has waived his ability to challenge on appeal the court's findings and conclusions regarding his parenting time of B.B. because he did not raise his arguments before the trial court. See, e.g., M.S. v. C.S., 938 N.E.2d 278, 285 (Ind. Ct. App. 2010) (finding waiver of appellant's claim of entitlement to parenting time as child's legal parent because of her failure to raise the argument before the trial court).

II.

The next issue is whether the trial court's findings and conclusions regarding the division of the marital estate were clearly erroneous. As noted above, here the court entered findings and conclusions, and we therefore review the court's findings and conclusions pursuant to our two-tiered standard of review. Davis, 889 N.E.2d at 379. First, we determine whether the evidence supports the findings, and second, whether the findings support the judgment. Id. We may not set aside the findings or judgment unless they are clearly erroneous. Menard, 726 N.E.2d at 1210.

Ind. Code § 31-15-7-4 governs the division of property in dissolution actions and requires that the trial court "divide the property in a just and reasonable manner." Ind. Code § 31-15-7-4(b). The court shall presume that an equal division of marital property between the parties is just and reasonable, and the trial court may deviate from an equal division only when that presumption is rebutted. Ind. Code § 31-15-7-5. The trial court's

division of marital property is "highly fact sensitive and is subject to an abuse of discretion standard." Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002). Also, a trial court's discretion in dividing marital property is to be reviewed by considering the division as a whole, not item by item. Id. We "will not weigh evidence, but will consider the evidence in a light most favorable to the judgment." Id. A trial court may deviate from an equal division so long as it sets forth a rational basis for its decision. Hacker v. Hacker, 659 N.E.2d 1104, 1109 (Ind. Ct. App. 1995).

It is well-established 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. This "one-pot" theory ensures that all assets are subject to the trial court's power to divide and award. Thompson v. Thompson, 811 N.E.2d 888, 914 (Ind. Ct. App. 2004), reh'g denied, trans. denied. Marital property also includes both assets and liabilities. Capehart v. Capehart, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999), reh'g denied, trans. denied. The trial court has no authority to exclude or set aside marital property but must divide all property. Moore v. Moore, 695 N.E.2d 1004, 1010 (Ind. Ct. App. 1998).

Here, Husband does not contest the court's determination of the assets, liabilities, and their respective values. His challenge instead centers on the court's division of the marital estate. Husband argues that: (A) the court erred in calculating Wife's thirty-three

percent share; and (B) the court's division was unjust and unreasonable. We address each of Husband's arguments separately.

A. The Trial Court's Calculations

First, Husband contends that the court erred in calculating Wife's thirty-three percent share when it added $98,395 to $276,053, which is equal to thirty-three percent of the net estate, for a total payment to Wife equaling $374,448. Wife opposes Husband's interpretation of the court's values used in its order, noting that his argument "simply defies understanding in the context of this case" and that "the math is proper." Appellee's Brief at 13-14.

In its order, the court assigned assets to Wife totaling $10,268 and to Husband totaling $1,066,559, for a total gross estate value of $1,076,827. The court assigned debts to Wife totaling $108,663, which consisted mostly of her student loan debt, and to Husband totaling $131,640. Thus, the parties incurred a marital debt totaling $240,303. The court then calculated the net estate, valued at $836,524, by subtracting the marital debt from the gross estate. As noted above, the court assigned sixty-seven percent, or $560,471, of the net estate to Husband and thirty-three percent, or $276,053, to Wife. In order to effectuate Wife's net thirty-three percent of the marital estate, Husband was ordered to pay over a total of $374,448 to Wife.[2] Husband's required payment to Wife of $374,448 is necessary in ensuring that both parties receive their respective share of the net marital estate. We find no error in the court's calculations.

[2] This amount was calculated by adding $276,053 (the amount the court determined to be Wife's net estate) and $108,663 (the value of debt the court assigned to Wife), and then subtracting $10,268 (the value of the assets assigned to Wife). After Husband pays Wife the sum of $374,448, he will be left with $692,111 in assets and a net estate of $560,471 after subtracting his debt of $131,640.

B. Division of the Marital Estate

Next, Husband argues that "the trial court created an unfair and unjust division by including a percentage of (the purported increase in value) the farm in [the] division [of assets]." Appellant's Brief at 8. Husband argues that the Farm should not be included in the net marital estate valuations because it was acquired before the parties were married. Again, "the court found that Husband had rebutted the presumption of an equal division because he brought the Farm into the marriage," and ordered a 67/33 percent split in Husband's favor. Appellant's Appendix at 24.

Ind. Code § 31-15-7-5 provides:

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> (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.

In its order, specifically Finding 41, the court entered detailed findings regarding each factor. In determining that Husband rebutted the presumption of an equal distribution of the marital estate and finding a 67/33 percent split appropriate, the court found that the first factor was "the strongest factor in this case." Id. The court reasoned:

> Although Husband initially acquired the property through inheritance and bought his brother out before the marriage, the real estate appreciated by over $700,000 during the marriage. Wife and Husband both worked and contributed income to the household; they have a child together; this is a long-term marriage. Wife should take some share in the real estate's appreciated value, especially considering that Husband did not assist Wife in paying off her student loan debt. It would be grossly unfair for Husband to take virtually all the assets and leave Wife with debt.

Id.

The court also found that the second factor strongly favored Husband because half of the Farm was acquired through inheritance and the other half was purchased from his brother before marriage. The court determined that the third factor favored Wife, who unlike Husband, lacks any means to earn extra income and has garnishments against her income for student loan debt. The court found that the fourth factor was not applicable

and that the fifth factor did not favor either party because "each party has relatively equal earning ability." Id.

The resulting division of property is not clearly against the logic and effect of the facts and circumstances. We conclude that the trial court's findings and conclusions which included the Farm in the net marital estate valuations and awarded sixty-seven percent of the total marital estate to Husband and thirty-three percent to Wife were not clearly erroneous.

III.

The next issue is whether the trial court abused its discretion in awarding appellate attorney fees to Wife in its Order After Remand. Husband argues that the trial court abused its discretion in awarding Wife $3,500 in appellate attorney fees, which he cannot afford. He contends that the trial court is "undoing the division [of the marital estate] now on appeal" by relying on the finding that Husband has $9,000 in cash because he will be required to use some of these funds to pay attorney fees to Wife. Appellant's Brief at 22. Husband also argues that Wife could have decided not to file a brief "if she is confident there are no reversible errors." Id. at 23. Wife argues that "the trial court properly considered [the parties'] very different financial resources." Appellee's Brief at 24.

Ind. Code § 31-15-10-1 provides that a trial court may order a party to pay a reasonable amount to the other party for the cost of maintaining or defending any dissolution action and for attorney fees in such proceedings. We review a trial court's award of attorney fees in connection with a dissolution decree for an abuse of discretion.

Hartley v. Hartley, 862 N.E.2d 274, 286 (Ind. Ct. App. 2007). The trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before it. Id. (citing McCullough v. Archbold Ladder Co., 605 N.E.2d 175, 180 (Ind. 1993)).

When making such an award, the trial court must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and other factors that bear on the reasonableness of the award. Id. Consideration of these factors promotes the legislative purpose behind the award of attorney fees, which is to insure that a party in a dissolution proceeding, who would not otherwise be able to afford an attorney, is able to have representation. Id. at 286-287. "When one party is in a superior position to pay fees over the other party, an award of attorney fees is proper." Id. at 287 (quoting Ratliff v. Ratliff, 804 N.E.2d 237, 249 (Ind. Ct. App. 2004)). The trial court need not, however, give reasons for its determination. Id.

Here, as noted by the trial court, Husband "owns real estate with an appraised value of over $1,000,000" and "has almost $9,000 in cash accounts," unlike Wife who "has little to no available cash." Appellant's Appendix at 30. Although each of the parties have equal financial earning ability, Wife's paychecks are being garnished for her student loan debt, making her income lower than Husband's. Wife also does not possess assets, such as the Farm, which can be used to produce additional income. We conclude that the trial court's decision to award Wife attorney fees was not an abuse of discretion. See Hartley, 862 N.E.2d at 287 (Finding no abuse of discretion in not awarding attorney

fees to party whom had been assigned a large about of marital assets which included land, was duly employed, and had no monthly financial obligations).

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.