

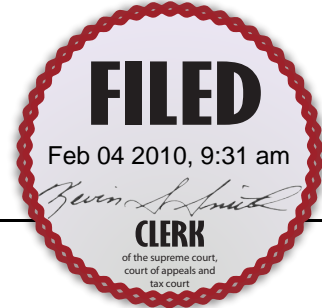
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**IN THE
COURT OF APPEALS OF INDIANA**

CYNTHIA AGUIRRE,
Appellant-Respondent,

vs.

STEVEN C. PASCHALL,
Appellee-Petitioner.

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No. 32A01-0907-CV-317

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0807-DR-107

February 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Cynthia Aguirre (“Wife”) appeals the trial court’s decree of dissolution of her marriage to Steven C. Paschall (“Husband”). We affirm in part and vacate in part.

Issues

Wife raises three issues, which we consolidate and restate as follows:

- I. Did the trial court abuse its discretion in dividing the marital estate in Husband’s favor?
- II. Did the trial court abuse its discretion by restricting the terms of Wife’s possession of the marital residence to exclude certain visitors?

Facts and Procedural History

The facts most favorable to the trial court’s order are as follows: Husband and Wife were married on May 5, 2000. Husband filed his petition for dissolution of marriage on July 30, 2008. No children were born to the parties during their marriage, but each has children from previous marriages. Wife’s children resided with her and Husband on a full-time basis during the marriage. Husband brought assets valuing approximately \$2 million dollars to the marriage. Husband claims that Wife’s premarital assets totaled approximately \$560,000, and Wife contends that they were approximately \$650,000. The trial court noted that, “in either event, [Husband’s] initial contribution to the assets of the parties far exceeded Wife’s contributions.” Appellant’s App. at 9. The parties did not enter into a prenuptial agreement. When they married, the parties joined their assets.

Husband, an emergency room physician, earned between \$250,000 and \$278,000 per year during the marriage. At the time of the final hearing, Husband’s average income was

\$30,000 per month. Prior to this marriage, Wife managed rental properties. After they married, Husband and Wife formed a limited liability company, through which Wife managed rental properties owned by both parties. During the course of the marriage, the parties earned zero income on the rental properties. The parties eventually agreed to sell the rental properties because Wife did not want to continue managing them. During their marriage, Wife participated in various education and training programs. She spent approximately \$15,000 taking training courses related to various potential occupations, including private investigation, American Sign Language, acupressure, animal behavior, and massage therapy. She became a certified massage therapist but turned down at least two offers for full-time positions. None of her training resulted in a contribution of income to the household.

Shortly before their marriage, Husband and Wife purchased a lot upon which they planned to build their marital residence. The parties contributed equally to this purchase. The parties spent approximately \$800,000 on the marital residence's construction. During the course of their marriage, Wife managed the couple's day-to-day finances and Husband managed the investments. Neither party placed any restrictions on the other's spending. They took frequent vacations to expensive resorts.

Prior to the marriage, Husband owned rental property in Culver, Indiana. He valued the condominium at \$188,000, based upon the fact that a similarly-situated unit sold for \$190,000 in November 2008. Wife claims that the property is worth approximately \$240,000. Pursuant to Husband's request at the final hearing, the trial court assigned a value

of \$240,000 to the condominium and awarded the property to Wife.

At the final hearing in this case, Wife testified that she was employed by Europa Therapeutic Massage, where she earned \$329 per week. She also received weekly child support of \$100 from her former husband. Pending the dissolution decree, Husband and his employer continued to contribute a total of \$4,249.99 to his 401(k) account each month. When the parties separated, Husband's net worth was approximately \$1.4 million. From the filing date to the date of dissolution, Husband contributed \$30,333.35 to his 401(k). In its final order, the trial court ordered a division of property of approximately 58% to Husband and 42% to Wife, after subtracting the post-filing 401(k) contributions of \$30,333.35.

The trial court's preliminary order granted Wife exclusive possession of the marital residence in Avon. The order also required Husband to pay the first and second monthly mortgage payments—totaling \$3,944 per month, plus real estate taxes of \$967 per month—on the marital residence. At the final hearing, Husband raised his concern that Wife's boyfriend was planning to move into the house. Wife testified that no one would live in the home except her and her son. On this subject, the trial court stated in its final order:

Pending sale, the respondent wife shall have temporary exclusive possession of the marital residence. In light of the fact that husband is paying the first and second mortgage[s] of the real estate, and the real estate taxes, wife shall not allow any male overnight visitors who are over twenty one (21) years of age and not a member of the family[.]

Appellant's App. at 19. The trial court ordered Wife to pay all utilities and homeowner's insurance on the residence and to maintain the house, pool, grounds, and lawn "in suitable condition for showing at all times[.]" *Id.* Wife now appeals.

Discussion and Decision

In its order, the trial court entered specific findings of fact and conclusions thereon.¹

Our two-tiered standard of review is well settled.

We first determine whether the record supports the findings and, second, whether the findings support the judgment. The judgment will only be reversed when clearly erroneous, i.e. when the judgment is unsupported by the findings of fact and the conclusions entered upon the findings. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility.

Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004) (quoting *Wyzard v. Wyzard*, 771 N.E.2d , 754, 756-57 (Ind. Ct. App. 2002)), *trans. denied*.

I. Division of Marital Property

Wife argues that the trial court erred by dividing the marital estate unequally in Husband's favor. When we review a claim that the trial court improperly divided marital property, we must decide whether the trial court abused its discretion. *Hill v. Hill*, 863 N.E.2d 456, 462-63 (Ind. Ct. App. 2007). We consider only the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or if the trial

¹ Wife makes much of the fact that the trial court adopted verbatim Husband's proposed findings of fact and conclusions thereon. While trial courts are discouraged from adopting a party's proposed findings, this practice is not prohibited. *In re Adoption of A.S.*, 912 N.E.2d 840, 851 (Ind. Ct. App. 2009), *trans. denied*. The trial court is ultimately responsible for the correctness of the findings. *Id.* As such, adoption of Husband's proposed findings was not in and of itself improper. *See id.*

court has misinterpreted the law or disregarded evidence of factors listed in the controlling statute. *Id* at 463.

The factors that a trial court must consider in dividing property are clearly laid out in Indiana Code Section 31-15-7-5:

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.

The party challenging the trial court's division of property must overcome a strong presumption that the trial court complied with Indiana Code Section 31-15-7-5 and considered evidence on each of the statutory factors. *Gaskell v. Gaskell*, 900 N.E.2d 13, 19 (Ind. Ct. App. 2009). This is one of the strongest presumptions applicable to our consideration on appeal. *Id.*

First, Wife alleges that the trial court failed to take into account her non-financial contributions to the marriage as well as the financial contribution of her rental properties. In fact, the trial court specifically found that Wife contributed to the marriage in ways that supported her husband's career, and it acknowledged her assets of between \$560,000 and \$650,000 that she brought to the marriage. The trial court also noted, however, that Husband brought over \$2 million in assets to the marriage and that he earned at least \$250,000 per year, while Wife managed their rental properties, an endeavor which actually lost money for the couple, and then incurred significant expenses in training for various potential careers, none of which resulted in an income until the couple separated. Wife argues that the trial court did not take into account her contribution of her own rental properties to the marriage. The trial court acknowledged the value of Wife's total assets coming into the marriage, which apparently included these rental properties. In essence, Wife is asking us to reweigh the evidence, which we may not do.

Second, Wife argues that the fact that she brought nearly \$1.5 million less than Husband into the marriage is irrelevant because "the parties commingled their assets throughout their marriage and had no prenuptial agreement that would restore either party to his or her premarital financial condition." Appellant's Br. at 17. Clearly, however, Indiana Code Section 31-15-7-5 states that one factor that may rebut an equal division is "[t]he extent to which the property was acquired by each spouse ... before the marriage[.]" Wife fails to cite any requirement, statutory or otherwise, that the parties must sign a prenuptial agreement

before this factor can be considered in dividing property upon dissolution. The trial court did not err in considering this factor in its decision.

Third, Wife contends that the trial court failed to consider her economic circumstances at the time the property division is to take effect. We disagree. In its findings, the trial court noted Husband's and Wife's respective incomes and ordered Husband to continue paying the first and second mortgages and tax bills for the marital home. The trial court also ordered that Wife and her son live in the marital home until it is sold, at which time, Husband and Wife will each receive a portion of the substantial equity in the home. Wife also received two vehicles and a rental property which she valued at \$240,000, as well as a 401(k) account of \$138,451.91 and a brokerage account of \$30,366.24. The court also noted that pursuant to the decree, Husband is awarded approximately \$1.2 million less than he had when he entered the marriage, and Wife has received assets close in value to the amount she brought into the marriage. Wife wants to be compensated for the rental properties that she brought into the marriage and which the parties jointly agreed to sell over the course of the marriage. Again, we cannot reweigh the evidence in order to find in Wife's favor on this issue.

Fourth, Wife claims that the trial court's findings imply that she was responsible for the dissipation of the couple's property during the course of their marriage. While the trial court did note that the couple's limited liability company lost money each year that Wife managed the business, it also found that the parties "jointly agreed to liquidate their rental properties." Appellant's App. at 10. The trial court also found that neither party placed any restrictions on the other's spending and that the two enjoyed frequent expensive vacations

together. The court also noted that throughout their marriage, the parties had been “mutually supportive” of each other’s career and educational pursuits. *Id.* at 12. These findings, which are supported by evidence in the record, do not indicate that the trial court considered the factor of dissipation of assets in its decision. If anything, they seem to suggest that the trial court found neither party more responsible than the other on this point.

Fifth, Wife argues that the trial court erred in excluding Husband’s post-filing 401(k) contributions from the marital estate. The trial court found that Husband and his employer had continued to make contributions to Husband’s TD Ameritrade 401(k) account after Husband filed his petition for dissolution. These contributions totaled \$30,333.35. The trial court awarded Wife 30% of the account *after* subtracting the total amount of Husband’s post-filing contributions. Wife argues that because the value of the TD Ameritrade account decreased nearly 50% during the seven months in which the dissolution was pending, the trial court must assume that Husband’s post-filing contributions also lost value and thus set off an amount less than his total post-filing contributions.

We disagree. Generally, property acquired after the date of final separation is excluded from the marital estate. *O’Connell v. O’Connell*, 889 N.E.2d 1, 11 (Ind. Ct. App. 2008). The dissolution statutes define the date of final separation as the date the petition is filed. *See* Ind. Code § 31-9-2-46. Thus, it was within the trial court’s authority to set off the amount of Husband’s post-filing contributions to the TD Ameritrade account, and there was no abuse of discretion here.

In sum, the record supports the trial court's findings, and the findings support the trial court's judgment. The trial court's decisions regarding the division of the marital estate were not clearly against the logic and effect of the facts and circumstances before it. Therefore, we affirm the trial court's property division.

II. Restriction on Wife's Use of Marital Residence

In the dissolution decree, the trial court ordered that "[W]ife shall not allow any male overnight visitors who are over twenty-one (21) years of age and not a member of the family[.]" Appellant's App. at 19. Husband contends that it would have been inequitable for the trial court "to require [Husband] to pay the cost of housing for unrelated adult friends of [Wife] after the dissolution of marriage." Appellee's Br. at 23. Without further explanation, it was an abuse of discretion for the trial court to grant Wife exclusive possession of the home and then dictate "visitation hours" for her guests. There is no rational basis, such as asset preservation, for such a restriction in this case. As previously mentioned, the trial court ordered that Wife maintain the residence, pool, and grounds in a suitable condition for showing at all times. She was to receive a percentage of the sale price, and thus it is in her best interest to maintain the value of the property. Wife's interest in the real estate upon sale is sufficient to protect Husband from any diminution of value that might occur from an overnight guest. Placing such a restriction on Wife's use of the residence impinges on her freedom of association in a way that is inconsistent with a dissolution and unwarranted under these circumstances. Therefore, we vacate the trial court's restriction on Wife's overnight guests in the marital residence.

Affirmed in part, vacated in part.

DARDEN, J., and BAILEY, J., concur.