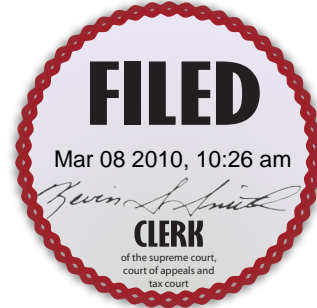


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BETSY DUNCAN,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 30A04-0908-CV-446
)	
KURT DUNCAN,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Jack A. Tandy, Special Judge
Cause No. 30C01-0709-DR-829

March 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Betsy Duncan (“Wife”) appeals from the trial court’s dissolution decree, which dissolved her marriage to Kurt Duncan (“Husband”). She raises the following restated issues:

- I. Whether the trial court abused its discretion in its unequal distribution of the marital property and erred when it failed to include certain property in the marital estate;
- II. Whether the trial court erred in calculating Husband’s child support arrearage;
- III. Whether the trial court abused its discretion when it failed to award attorney fees and costs to Wife for a motion for rule to show cause and a motion to compel; and
- IV. Whether the trial court abused its discretion when it ordered Wife to pay half of the guardian ad litem (“GAL”) fees for an addendum report, even though the GAL never spoke with Wife prior to creating it.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on November 26, 1993, and two children were born to the marriage. Wife filed a petition for dissolution of marriage on September 10, 2007, and a provisional order was issued on October 18, 2007. In the provisional order, Husband was ordered to pay child support for both children in the amount of \$60.00 per week, commencing the first Friday after the filing of the dissolution petition, which would have been September 14, 2007. At the time of the final hearing, on April 20, 2009, Husband had paid \$4,500.00 in child support.

For purposes of the dissolution, an appraisal was done on the value of the personal property of the parties. The appraisal listed valuations of items located at each residence

with the items located at Husband's residence totaling \$74,075.00 and the items located at Wife's residence totaling \$36,730.18 for a total value of \$110,805.18. *Appellant's App.* at 125, 131. Additionally, a camper was valued at \$3,000.00 and jewelry owned by the parties was valued at \$2,325.00. The appraisal of items at Wife's residence included items totaling approximately \$725.00 that belonged to third parties and not to Husband or Wife. The appraisal also included \$16,370.00 worth of items that Husband deemed as inherited from his father and \$16,315.00 worth of leathershop and embroidery equipment purchased with money inherited from Husband's father. Wife testified at the final hearing that, at the time of the dissolution petition, Husband had an American Funds IRA valued at \$1,229.54, which was not part of the appraisal of personal property. At the time the petition was filed, Husband also had a Merrill Lynch account containing \$34,404.00, which was inherited from his father.

In the final dissolution decree, the trial court assigned personal property valued at \$21,741.00 to Wife as well as a boat worth \$2,500.00 and the jewelry valued at \$2,325.00. Wife was also assigned debt in the amount of \$24,032.95. The trial court assigned personal property valued at \$51,429.00 to Husband as well as the camper valued at \$3,000.00 and the Merrill Lynch account valued at \$34,404.00. Husband was also assigned debt in the amount of \$8,054.00. The trial court found that an unequal division of property in Husband's favor was appropriate because "a substantial asset, the \$34,404[.00] proceeds of the Merrill Lynch account, was received as a result of his father's death." *Id.* at 14-15. The trial court found that a division of the net estate with Wife receiving thirty percent and Husband receiving

seventy percent was appropriate. To achieve that result, Husband was ordered to pay Wife the sum of \$22,460.57.

During the pendency of the dissolution, Wife filed two motions for order to show cause in attempts to get Husband to pay his child support obligation. The first motion was filed on August 12, 2008, and after a hearing was held, Husband was ordered to pay attorney fees in the amount of \$300.00. The second motion was filed on February 12, 2009, and a separate hearing was not held as the motion was heard during the final dissolution hearing. Husband was not ordered to pay attorney fees as a result of this motion. In the final dissolution decree, the trial court found that Husband owed a child support arrearage of \$180.00, calculating that Husband should have paid a total of \$4,680.00 for the time period since the provisional order had been issued, and the records showed that he had only paid \$4,500.00.

A GAL was appointed for the dissolution proceedings, and the parties were ordered to each pay half of the GAL's fees. The GAL filed a report with the trial court on September 4, 2008, after interviewing the parties and the children. On February 12, 2009, the GAL filed an addendum report. The GAL did not speak with Wife before filing this report, but did leave a voicemail on Wife's cell phone the night before it was filed. At the final hearing, the GAL submitted that her fees for the dissolution matter totaled \$1,122.00. The trial court issued an order requiring the parties to each pay half of this sum to the GAL. Wife now appeals.

DISCUSSION AND DECISION

We initially note that Husband has failed to file an appellee's brief. In such a situation, we will not undertake the burden of developing arguments for Husband. *Cox v. Cantrell*, 866 N.E.2d 798, 810 (Ind. Ct. App. 2007), *trans. denied*. We apply a less stringent standard of review, and we may reverse the trial court's decision if the appellant can establish prima facie error. *Id.* Prima facie means "at first sight, on first appearance, or on the face of it." *Id.*

I. Property Distribution

A. Inclusion of Assets in Marital Estate

Wife first argues that the trial court erred when it failed to include some property in the marital estate and when it included other property, which should not have been included. It is well-established in Indiana that all marital property goes into the marital pot for division, whether it was owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4(a); *Hill v. Hill*, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). This "one-pot" theory insures that all assets are subject to the trial court's power to divide and award. *Hill*, 863 N.E.2d at 460. While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. *Id.*

Wife initially contends that the trial court erred in its inclusion in the marital estate of property belonging to third parties. In the appraisal done of the parties' personal property,

several items that totaled \$725.00 were included that belonged to third parties. Although these items were included in the appraisal, we do not believe that they were actually included in the marital estate. In our review of the record before us, the trial court seems to have used the property values contained in Husband's Exhibit A-1 in its determination, and in that exhibit, the values of property belonging to third parties was excluded from the marital estate. *Resp't's Ex. A-1*.

Wife next argues that the trial court erroneously excluded several items of property from the marital estate. Specifically, she points to property totaling \$16,370.00 in value, which Husband claimed was inherited from his father; property used for a leatherworking hobby totaling \$16,315.00 in value; and an American Funds IRA, which was valued at \$1,229.54 at the time of the dissolution petition.¹ On this issue, Wife has established prima facie error. Although the property inherited from Husband's father and the leatherworking equipment were included in the appraisal, the values seem to have been excluded from the property values included in the final dissolution decree. Additionally, we find no reference to the American Funds IRA in the listing of assets in the marital estate. We therefore conclude that it appears the trial court erroneously excluded this property from the marital

¹ Wife also argues that the trial court erred when it failed to acknowledge adjustments to the appraised value of property in the possession of each party at the time of the final decree. Specifically, she points to \$10,169.18 worth of property that Husband removed from the marital residence after the appraisal occurred, a \$75.00 dolly that was awarded to her in the decree but had been removed from the residence by Husband, and approximately \$1,555.00 worth of property that Husband was awarded in the final decree that was still in her possession. Likewise, Wife contends that the trial court erred in assigning the unvalued basketball goal and Tom-Tom GPS to Husband when she had requested possession of the items. These arguments by Wife are more accurately framed as arguments as to distribution of property and not as to the inclusion of property in the marital estate. As we consider the disposition of the marital estate as a whole and not item by item, we do not address these specific contentions. *See Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006).

estate. We remand this case to the trial court for inclusion of this property in the marital estate.²

B. Division of Marital Estate

The disposition of marital assets is an exercise of the trial court's sound discretion. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). We review a claim that the trial court improperly divided marital property for an abuse of discretion. *Id.* In doing so, we consider the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id.* Although a different conclusion might be reached in light of the facts and circumstances, we will not substitute our judgment for that of the trial court. *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 the court, or if the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute." *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005), *trans. denied*.

In a dissolution of marriage, the trial court must divide marital property in a just and reasonable manner, including property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4. The trial court's disposition of the marital estate is to be considered as a whole, not item by item. *Eye*, 849 N.E.2d at 701. An equal division of

² Wife also asserts that the trial court erred when it failed to include a debt of \$100.00 owed by Husband to Wife in the marital estate. We find this exclusion to be de minimis and therefore do not find error.

marital property is presumed to be just and reasonable. Ind. Code § 31-15-7-5. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence of 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. “Importantly, ‘when ordering an unequal division, the trial court must consider *all* of the factors set out in [the statute].’” *Eye*, 849 N.E.2d at 701 (quoting *Wallace v. Wallace*, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999), *trans. denied* (2000), (emphasis in original)). We begin with the strong presumption that the trial court considered and complied with the applicable statute, which must be overcome by a party challenging the trial court’s division of marital property. *Hatten*, 825 N.E.2d at 794.

Wife argues that the trial court abused its discretion when it deviated from the statutory presumption of equal division. She contends that an unequal division of the marital estate was an abuse of discretion because the trial court's sole reason for the deviation was that the \$34,404.00 Merrill Lynch account had been inherited as a result of the death of Husband's father. Because the trial court did not indicate that it considered any of the other statutory factors, Wife asserts that it abused its discretion.

In the final dissolution decree, the trial court assigned assets in the value of \$26,566.00 to Wife and in the value of \$88,833.00 to Husband. It found that an unequal division of property in Husband's favor was appropriate because the \$34,404.00 Merrill Lynch account, which was a substantial asset, was received as a result of the death of Husband's father. The trial court found that, therefore, Husband should receive seventy percent of the marital estate, and Wife should receive thirty percent of the marital estate. It then ordered Husband to pay Wife \$22,460.57 in order to achieve that division.

Indiana Code section 31-15-7-5 clearly states that whether property is acquired by one spouse through inheritance or gift is one factor that must be considered when a trial court determines that an unequal distribution would be just and reasonable. Ind. Code § 31-15-7-5(2)(b). However, this factor must be considered in conjunction with relevant evidence concerning the other statutory factors and any evidence that demonstrates that an unequal distribution would be just and reasonable. *Id.* In *Eye*, the wife appealed an unequal property division in favor of the husband where the trial court only explicitly addressed whether the property was acquired through inheritance or gift but did not issue findings addressing the

other statutory factors, “specifically the contribution of the parties, the conduct of the parties, and the relative earning ability of each party.” 849 N.E.2d at 703. This court found that the act of setting aside the inherited property based solely on its inheritance “affected an unequal distribution of the marital estate absent consideration of other factors necessary for the conclusion that such a distribution would be just and reasonable.” *Id.* at 705. Therefore, the presumption that the trial court complied with the applicable law in dividing the assets was rebutted, and we found that the trial court abused its discretion. *Id.*

Here, the trial court found that an unequal division of the marital property in Husband’s favor was warranted because a substantial asset, the Merrill Lynch account, had been received through the death of Husband’s father. Although the trial court explicitly addressed whether the property was acquired through inheritance as a reason for an unequal distribution, it failed to specifically address the other factors from Indiana Code section 31-15-7-5. While “we acknowledge that ‘[t]he trial court’s exclusion of these factors from its written findings does not mean that it did not consider them,’ we are unable to infer from the findings that the trial court did so.” *Id.* at 703 (quoting *Shumaker v. Shumaker*, 559 N.E.2d 315, 318 (Ind. Ct. App. 1990)). We therefore conclude that the trial court abused its discretion and remand with instructions to determine the distribution of the marital estate in accordance with the statutory requirements.³

³ This is not to say that an even distribution is required in the present case. Consideration of the relevant evidence under Indiana Code section 31-15-7-5 may or may not determine that the parties’ situation warrants an unequal distribution as just and reasonable.

II. Child Support Arrearage

Decisions regarding child support are generally within the sound discretion of the trial court. *Billings v. Odie*, 891 N.E.2d 106, 108 (Ind. Ct. App. 2008). We will reverse such a determination only if there has been an abuse of that discretion or the trial court's determination is contrary to law. *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 the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Poppe v. Jabaay*, 804 N.E.2d 789, 793 (Ind. Ct. App. 2004), *trans. denied, cert. denied* (2005).

Wife argues that the trial court abused its discretion in its calculation of the child support arrearage owed by Husband. She contends that, according to the provisional order, Husband was ordered to pay child support beginning the first Friday after the dissolution petition was filed, and therefore, he owed \$540.00 in arrearage and not \$180.00 as found by the trial court. We agree.

In the final dissolution decree, the trial court found that Husband owed a child support arrearage of \$180.00, by calculating the arrearage from the date of the provisional order. Based upon the trial court's calculation, Father should have paid \$4,680.00 and had only paid \$4,500.00, leaving an arrearage of \$180.00. However, in the provisional order, Husband was ordered to pay child support in the amount of \$60.00 a week, beginning the first Friday after the filing of the dissolution petition, which would have been September 14, 2007. *Appellant's App.* at 45. Therefore, as of the date of the final hearing on April 20, 2009, 84 weeks had elapsed, and Husband should have paid \$5,040.00 in child support. The Hancock

County Clerk's records indicated that he had only paid \$4,500.00, which would make the arrearage amount \$540.00. The trial court abused its discretion in its calculation of Husband's child support arrearage, and we remand to the trial court to recalculate the arrearage accordingly.

III. Attorney Fees

Wife argues that the trial court abused its discretion when it failed to award her attorney fees and costs incurred as a result of the filing of a motion for order to show cause and of obtaining Husband's bank records. Indiana Code section 31-15-10-1(a) provides:

The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

Pursuant to Indiana Code section 31-16-11-1, a trial court has broad discretion in imposing attorney fees in family law matters. *Redd v. Redd*, 901 N.E.2d 545, 554 (Ind. Ct. App. 2009). We may reverse the trial court's decision only if it is clearly against the logic and effect of the circumstances before the court. *Thompson v. Thompson*, 868 N.E.2d 862, 870 (Ind. Ct. App. 2007).

Here, Wife filed a motion for order to show cause on February 12, 2009 because Husband was in arrears for his child support. Although attorney fees had been ordered when Wife filed a prior motion for order to show cause, a separate hearing was held on that motion, where Husband agreed he was in contempt as a result of failing to timely pay child support. *Appellant's App.* at 55. A separate hearing was not held on this motion; instead, it

was dealt with during the final hearing in the dissolution matter. We do not believe that the trial court abused its discretion in not awarding attorney fees.

Additionally, it was not an abuse of discretion for the trial court to not order Husband to pay Wife for fees in obtaining his bank records. On April 14, 2009, Wife filed a motion to compel regarding discovery that Husband had failed to produce with a deadline date of April 17, 2009. During the final hearing, Husband's attorney stated that the requested bank records had been provided to Wife on April 17. *Tr.* at 112. We therefore conclude that it was not an abuse of discretion when the trial court did not award the costs of obtaining the bank records to Wife.

IV. GAL Fees

Wife argues that it was an abuse of discretion for the trial court to order her to pay half of the GAL fees for an addendum report done without consultation with Wife. Under Indiana Code section 31-15-6-10, a trial court may order either or both parents to pay user fees for GAL services when one is appointed in a dissolution action. A trial court's determination as to the payment of fees and costs in a dissolution action is reviewed for an abuse of discretion. *Maxwell v Maxwell*, 850 N.E.2d 969, 975 (Ind. Ct. App. 2006), *trans. denied* (2007).

In the present case, the trial court appointed a GAL and ordered the parties to equally pay her fee. Over the course of the proceedings, the GAL filed her report with the trial court and later an addendum to that report. Wife takes issue with paying half of the fee for the addendum report because the GAL did not speak personally with her before filing it.

Although the GAL was not able to contact Wife before completing the addendum, she did speak with Husband and both children and left a voicemail for Wife. The GAL also testified that she only spent one hour completing this addendum report. This addendum report was part and parcel of the GAL's report to the trial court regarding custody of the children. We conclude that the trial court did not abuse its discretion in ordering Wife to pay half of the GAL fees, including the fees associated with the addendum report.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and MAY, J., concur.