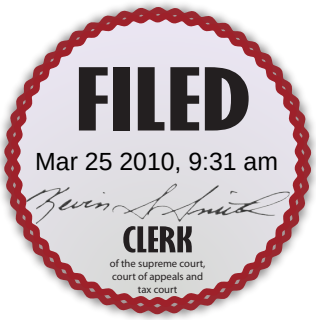

ATTORNEY FOR APPELLANT:

KATHERINE J. NOEL
Noel Law
Kokomo, Indiana

ATTORNEY FOR APPELLEE:

MARK A. DABROWSKI
Dabrowski Law Office
Kokomo, Indiana

IN THE COURT OF APPEALS OF INDIANA

DIANE L. DOWNING,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 34A02-0910-CV-1035
	)	
BRYAN A. DOWNING,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Donald E. Currie, Special Judge
Cause No. 34D04-0902-DR-198

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Diane Downing ("Wife") appeals the trial court's distribution of the marital estate in its order dissolving her marriage to Bryan A. Downing ("Husband").

We affirm.

ISSUES

1. Whether the trial court erred when it did not include in the marital estate the severance payment offered to and received by Husband subsequent to the filing of the petition for dissolution.

2. Whether the trial court abused its discretion when it ordered an equal division of the marital estate.

FACTS

The parties married on October 7, 1978. On February 14, 2009, Wife moved from the marital home. On February 18, 2009, Husband filed a petition for dissolution. On July 8, 2009, the parties appeared before the trial court for a final hearing. Both Husband and Wife testified, and exhibits were admitted into evidence.

Husband testified that at the time the petition for dissolution was filed, he was employed by Toppan Photomasks, Inc. On May 12, 2009, Toppan notified him that "[d]ue to business conditions," his employment there would "be terminated effective 5/12/2009." (Ex. 1). He was offered a "salary continuation" payment based on the length of his employment if he timely "execute[d], return[ed] and d[id] not revoke" a "General Release of Claims." *Id.* Husband accepted the offer and received the payment reflecting two weeks of salary for every one year of his employment, *i.e.*, 52.71 weeks' salary for his 26.35 years. Thereafter, he was unemployed; at the time of the July

hearing, he was collecting unemployment benefits and seeking new employment in Texas.

Wife testified that she had quit college, after two years, to marry Husband, and that during the marriage, she had been a stay-at-home mom.[1] She further testified that given Husband's employment-related travel and absences from the home, she had taken primary responsibility for maintaining the parties' household affairs. During the marriage, Wife engaged in part-time sales activities – the most recent seven years of which were reflected in her resume, and Husband testified that she had "excellent capabilities" in "marketing and sales." (Tr. 35). After Wife left the marital residence in February, she sought full-time employment. At the time of the final hearing, she was working forty hours a week, for $8.00 per hour, at American Health Network.

At the conclusion of the hearing, the trial court ordered the dissolution of the marriage. On September 11, 2009, the trial court issued its findings of fact and conclusions of law. The trial court's conclusions with respect to Wife's arguments on appeal were that the severance payment received by Husband was "not an asset of the marriage"; and "that an equal division of the marital property between the parties [was] just and reasonable." (Order at 9, 10).

DECISION

At the outset, we note that our standard of review in dissolution cases is deferential; we may not reweigh the evidence or assess the credibility of witnesses.

[1] The parties' children were over the age of twenty-one at the time of the dissolution.

Miller v. Miller, 763 N.E.2d 1009, 1011 (Ind. Ct. App. 2002). We consider only the evidence most favorable to the trial court's disposition of marital property. *Id.*

1. Severance

Wife argues that because Husband's severance payment "was based solely on" his twenty-six-year employment at Toppan, "all served during the marriage," she "believes this benefit should be considered a marital asset." Wife's Br. at 5. In support, she cites to Indiana Code section 31-15-7-4, which provides that the marital property subject to division in an action for dissolution is that

> (1) owned by either spouse before the marriage;
> (2) acquired by either spouse in his or her own right:
> (A) after the marriage; and
> (B) before final separation of the parties; or
> (3) acquired by their joint efforts.

Wife then asserts that the severance payment was "acquired by the joint efforts of the parties." Wife's Br. at 7. However, the exhibit documenting the severance payment offer reflects that it was an offer (1) made nearly two months after the parties' separation; (2) made to Husband only; (3) subject to only Husband's acceptance or rejection; and (4) based on the length of Husband's employment. Although Wife may have facilitated Husband's successful employment with Toppan, she provides no authority for the proposition that such would transform the terms of the severance offer itself. Accordingly, we do not find that the trial court abused its discretion when it did not find Husband's severance payment to be a marital asset acquired by the joint effort of the parties.

Wife asserts that the severance payment "is similar to a vested pension benefit or supplemental pension benefits," inasmuch as both "are usually solely based on years of service." *Id.* She cites to *Coffey v. Coffey*, 649 N.E.2d 1074 (Ind. Ct. App. 1995), and *Harvey v. Harvey*, 695 N.E.2d 162 (Ind. 1998). *Coffey* involved benefits being received by the husband pursuant to a pension which was "vested at the time of dissolution" and "not a future income interest." 649 N.E.2d at 1076, 1077. Wife does not attempt to apply *Coffey*, and we do not find it to be on point. *Harvey* found that supplemental retirement benefits which the husband "had a present right to withdraw" were "within the definition of marital property subject to division." 695 N.E.2d at 166. Again, Wife does not attempt to apply *Harvey*, and we do not find it to be on point. Further, as we held in *Granzow v. Granzow*, 855 N.E.2d 680, the marital estate does not include a pension benefit that was not "vested in its entirety until after the final separation date," *id.* at 684, with the separation date being "the day the petition for dissolution is filed." *Id.* (citing I.C. § 31-9-2-46). On the separation date, Husband held no vested entitlement to the severance payment that was subsequently offered to him.

The trial court expressly found as follows:

> Following the filing of the divorce, [Husband]'s employer terminated [him] due to economic and market conditions;
>
> [Husband] was offered a severance package, which by virtue of [his] Exhibit One, specifically provided that "[t]he benefits potentially available under the Plan consist of a salary continuation portion and assistance with COBRA continuation coverage, should you elect such coverage in a timely manner";
>
> The severance package did not alter [Husband]'s vested retirement benefits in any way; [and]
>
> [Husband]'s employment was terminated, regardless of whether he opted to accept the severance package or not.

(Order at 2). The trial court also concluded that Husband's severance payment was "an income continuation for a period of time with the amount offered to him being based on his years of service"; and was "not an asset of the marriage, . . . and no more subject to division by the Court than had [Husband] continued in his employment and drawn a period paycheck." (Order at 9). In its conclusions of law, the trial court noted that under Indiana law, future income is not marital property divisible by the trial court. *See In re Marriage of McManama*, 399 N.E.2d 371, 372 (Ind. 1980).

The findings are supported by the evidence, and it remains the law in Indiana that future income is not an asset subject to distribution in a dissolution. *See Beckley v. Beckley*, 822 N.E.2d 158, 162 (Ind. 2005). Therefore, we find that the trial court did not abuse its discretion when it held that Husband's severance payment was not a marital asset.

2. Equal Division

The party challenging the trial court's property division bears the burden of proof. *Smith v. Smith*, 854 N.E.2d 1, 5 (Ind. 2006). That party must also overcome a strong presumption that the trial court considered and complied with the applicable statute. *Id.*

Wife argues that the trial court "abused its discretion by equally dividing the marital assets." Wife's Br. at 7. She reminds us that although the trial court must "presume that an equal division of the marital property between the parties is just and reasonable," the presumption "may be rebutted by a party who presents relevant evidence, including evidence concerning" certain factors "that an equal division would

not be just and reasonable." I.C. § 31-15-7-5. Wife argues that the trial court failed to consider two of these factors: "the economic circumstances of each spouse at the time the disposition of the property is to become effective," and the "earning ability of the parties." *Id.* at (3) and (5).

The trial court made findings that included the termination of Husband's employment, and Wife's employment at $8.00 per hour. It enumerated the substantial amount of property acquired "by the parties during their marriage and through each of their individual efforts and contributions, although not necessarily in equal measure." (Order at 2). It also found that during the pendency of the dissolution, Husband had paid mortgage, insurance and tax expenses on the marital residence, and ordered that he continued to do so until its sale. Further, the final order directed that the marital residence, a lake property, and a boat be sold, with the proceeds "equally divided"; provided for the transfer from Husband's Toppan 401K of an amount sufficient to effect the equal disposition of the marital estate; and "equally divided" Husband's defined benefit pension. (Order at 8).

The trial court expressly stated that it "considered the parties[']condition and circumstances, including the employment or lack thereof of each party and consider[ed] the asset base available to the parties as distributed," and concluded that "post-dissolution rehabilitative maintenance as requested by [Wife] [was] inappropriate," inasmuch as Wife would "have significant funds from which to pursue further education" upon the ordered sale of the parties' properties. (*Id.* at 7). It further expressly stated that it had "considered . . . the economic circumstances of each spouse at the time the disposition of

the property [was] to become effective, . . . and the . . . earning ability of the parties as related to the final division of property and final determination of the property rights of the parties," in reaching its conclusion "that an equal division of the marital property between the parties [was] just and reasonable." *Id.* at 10. Thus, the trial court did consider the parties' economic and employment circumstances.

Wife has not overcome the strong presumption that the trial court did not abuse its discretion when it ordered an equal division of the marital estate.

Affirmed.

BAKER, C.J., and CRONE, J., concur.