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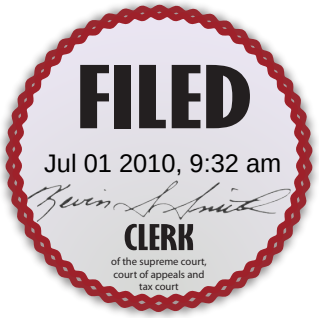


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# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| IN RE THE MARRIAGE OF | ) | |
| | ) | |
| J.R., | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| and | ) | No. 30A01-0912-CV-581 |
| | ) | |
| M.R., | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard D. Culver, Judge
Cause No. 30C01-0607-DR-584

**July 1, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

The marriage of J.R. ("Mother") and M.R. ("Father") was dissolved in the Hancock Circuit Court. Mother appeals the child support order and the division of marital assets. We affirm in part, reverse in part, and remand with instructions.

## Issues

Mother presents three issues for review:

I. Whether the trial court clearly erred in determining Father's weekly gross income for child support purposes;
II. Whether the trial court abused its discretion in the selection of a valuation date relative to the marital residence and a pension plan; and
III. Whether the trial court abused its discretion in the division of the marital estate.

## Facts and Procedural History

Mother and Father were married for ten years and had one child during their marriage. On July 4, 2009, the marriage was dissolved. Mother was awarded physical custody of the minor child, and Father was ordered to pay weekly child support of $195.16 plus $62 for his proportional cost of tutoring services. After assigning an asset value to Mother's education equal to outstanding student loans, and setting aside a military pension to Father, the trial court purportedly divided the marital pot of assets and debts equally. Mother appeals.

## Discussion and Decision

### I.A. Standard of Review

At Mother's request, the trial court made specific findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. Accordingly, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. K.I.

ex rel. J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). We will not set aside the findings or judgment unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Id. (citing Trial Rule 52(A)). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. Id. A judgment is also clearly erroneous when the trial court has applied the wrong legal standard to properly found facts. Id.

I.B. Analysis – Determination of Father's Gross Income

The trial court determined that Father's weekly gross income for child support purposes is $1,267. Mother argues that the proper computation of Father's weekly gross income is reached by multiplying his current hourly wage of $32 by 40 ($1280) and then adding an amount equal to ten to twenty hours of overtime pay per week.

"A trial court's calculation of child support is presumptively valid." Young v. Young, 891 N.E.2d 1045, 1047 (Ind. 2008). We will reverse only for clear error. Id. The Indiana Child Support Guidelines ("Guidelines") advocate a total income approach to calculating weekly gross income. Ratliff v. Ratliff, 804 N.E.2d 237, 245 (Ind. Ct. App. 2004). Nonetheless, the determination of income is fact-sensitive when irregular income, such as bonuses, overtime, and commissions, is involved. Id. When the trial court has determined that it is not appropriate to include irregular income in the calculation of child support, the court should express its reasons. Saalfrank v. Saalfrank, 899 N.E.2d 671, 678 (Ind. Ct. App. 2008).

At first blush, it would appear that the trial court simply excluded Father's overtime

income from its gross income calculation. However, the calculation required of the trial court was more complex. Father is a union pipefitter, and has traditionally been laid off in the winter months but has worked more than forty hours per week in other seasons. Mother's Exhibit 10 and the parties' testimony established that, in 2007, Father had earned approximately $71,000 (an average weekly income of $1365).[1] The parties testified in some detail about more recent economic conditions having an impact upon their available income. Father had found it necessary to travel to another state to obtain work, and Mother's hours of employment as a hospital nurse had been reduced to approximately thirty hours per week.

The trial court's determination that Father's gross weekly income is $1267 anticipates future earnings of $98 less than his 2007 gross wages as reported on his federal tax return.[2] The conclusion that decreased income is available for child support is consistent with the trial court's findings that Father had been laid off indefinitely in 2008 and, after obtaining out-of-state work, incurred significant travel expenses to exercise parenting time. Nonetheless, the trial court did not explicitly state the reasons for its selection of $1267 as an appropriate weekly gross income, as it should have done given the evidence of irregularity of earnings.

However, we do not find that the omission of an explicit statement renders the child support order clearly erroneous. The evidence of record would not support the calculation of gross income now advocated by Mother, as her calculation is premised upon forty hours of

[1] Exhibit 10, a copy of the parties' 2007 federal tax return, showed an aggregate gross income of $108,034. Mother testified that she had earned approximately $37,000 of that amount. Exhibit 10 also reflected a deduction for $14,696 of unreimbursed employee expenses.

[2] The trial court did not address the practical reduction in Father's gross income due to his significant amount of unreimbursed employee expenses, as reflected in the 2007 federal tax return.

consistent base pay plus reliable overtime. Moreover, had the trial court computed Father's child support based upon a gross weekly income of $1365 (consistent with Mother's Exhibit 10), as opposed to $1267, the child support award would not have significantly increased. A Guidelines worksheet computation using the higher income would have resulted in a recommended child support award of $203 weekly instead of $195.16 weekly.[3] We do not find the trial court's calculation of gross income in this instance to be clearly erroneous. See, e.g., In re Marriage of Nienaber, 787 N.E.2d 450, 457 n.6 (Ind. Ct. App. 2003) (finding de minimis mathematical error to be harmless and reversal not warranted).

## II. Valuation Date

In valuing the marital residence, the trial court used the first appraisal obtained by Mother in the fall of 2008. Mother's pension plan was valued as of the date of the final separation. Although she initially suggested the values adopted by the trial court, Mother claims that the assets should have been valued as of the final hearing date, to most accurately reflect asset devaluation in an economic recession. The trial court has discretion to set any date between the date the dissolution petition is filed and the date of the final hearing as the date for marital property valuation. Granzow v. Granzow, 855 N.E.2d 680, 685 (Ind. Ct. App. 2006). Although it is possible that the selection of a valuation date might, in some circumstances, result in an injustice such that there has been an abuse of discretion, Mother has not demonstrated that this is the case here.

[3] Mother's income and child care expense would have remained the same; Father's parenting time credit would have increased.

## III. Property Division

In dividing marital property, the trial court shall presume that an equal division between the parties is just and reasonable. Ind. Code § 31-15-7-5. This presumption may be rebutted, however, by relevant evidence that an equal division would not be just and reasonable, including evidence of the following factors: (1) the contribution of each spouse to the acquisition of the property, (2) the extent to which the property was acquired by each spouse before marriage or through inheritance or gift, (3) the economic circumstances of each spouse at the time of disposition, (4) the conduct of the parties as related to the property, and (5) the earnings or earning ability of the parties. Id.

Here, the marital estate consisted of a residence, pensions, two vehicles, some personal property, gravesites, and debts that substantially exceeded the liquid assets.[4] The trial court expressed an intention to equally divide the marital estate, apart from setting aside to Father the value of his military pension. To this end, the trial court awarded the marital residence (subject to its mortgage) and gravesites to Mother, allowed each party to keep the vehicle and personal property in his or her possession, assigned a value to Mother's nursing degree equal to all educational debt, attributed that debt solely to Mother, awarded Mother the value of her pension, assigned a tax debt to Father, and ordered each party to pay a portion of charge accounts.[5]

Mother contends that the trial court's division of marital assets and debts resulted in a

[4] The parties have some pension funds of unspecified value, which may exceed their debts.

[5] The trial court also found that Father's union pension was subject to division pursuant to a Qualified Domestic Relations Order.

greatly disparate distribution despite the trial court's expressed intention of an equal distribution (excluding the military pension).[6] We must agree, as the purportedly "equal" distribution was accomplished by treating an intangible – value of education – as an asset.

As of the final hearing, the balance of a Sallie Mae student loan was $42,130 and the balance of a Stafford student loan was $6,000. The trial court arbitrarily assigned a value to "wife's education" of $42,130 and $6,000 to mirror the loan balances. (App. 11.) However, a degree is not an asset. See Roberts v. Roberts, 670 N.E.2d 72, 76 (Ind. Ct. App. 1996), trans. denied; Prenatt v. Stevens, 598 N.E.2d 616, 620 (Ind. Ct. App. 1992), trans. denied. Additionally, a trial court errs by simply "assigning the Wife's student loans on the basis that Wife has the degree and she should now pay for it." Nornes v. Nornes, 884 N.E.2d 886, 889 (Ind. Ct. App. 2008). Nonetheless, pursuant to Indiana Code Section 31-15-7-5, the trial court may consider the effect that a degree may have upon the earnings or earning ability of a party. Id.

Here, however, it is uncontroverted that the student loan funds were obtained during an employment layoff and used primarily to supplement the family income and pay off debt. Father testified that he did not "remember instructing" Mother to take out loans and that he thought the amount was "ridiculous," but he did not contradict Mother's testimony that the money was used to pay for a truck, boat, and other debt. (Tr. 175.) As such, an allocation of the entire student loan debt to Mother is wholly unsupported by the evidence of record. We

[6] Father's active duty pre-dated the parties' marriage in 2000, but Father continued to serve in the National Guard until 2007. No evidence was presented as to whether Father accrued any additional pension benefits during the National Guard Service.

reverse the property division order and remand for a just and equitable division pursuant to Indiana Code Section 31-15-7-5.

## Conclusion

The child support award is not clearly erroneous. However, the trial court failed to divide the marital estate in a just and equitable manner pursuant to statutory authority, and we remand for that purpose.

Affirmed in part, reversed in part, and remanded.

MAY, J., and BARNES, J., concur.