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ATTORNEYS FOR APPELLANT:

JUDITH H. STANTON
Indiana First Judicial District Pro Bono Committee, Inc.
Hobart, Indiana

TIMOTHY J. O'HARA
BRYAN H. BABB
SUZANNA HARTZELL-BAIRD
Bose McKinney & Evans, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

SOPHIA J. ARSHAD
Arshad Pangere and Warring, LLP
Merrillville, Indiana

MICHAEL W. BACK
Crown Point, Indiana

IN THE COURT OF APPEALS OF INDIANA

ROBIN L. RASHIN,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A04-0911-CV-660
	)	
MARK W. RASHIN,	)	
	)	
Appellee.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-0705-DR-363

November 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Robin L. Rashin ("Wife") appeals the trial court's order dissolving her marriage to Mark W. Rashin ("Husband").

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

ISSUES

1. Whether the trial court abused its discretion by declining to award maintenance to Wife.

2. Whether the trial court abused its discretion when it found that Husband had not dissipated marital assets.

3. Whether the trial court abused its discretion in failing to find Husband in contempt.

4. Whether the trial court abused its discretion in its division of the marital estate.

5. Whether Wife is entitled to an award of appellate attorney fees.

FACTS

Husband and Wife were married on August 29, 1980. Two children were born of the marriage. A.R. was born in December of 1984, and D.R. was born in December of 1989.

Husband began working for the City of Chicago in July of 1981. In 2006, 2007, and 2008, Husband earned a gross income of $91,006.00, $71,222.00, and $103,070.53, respectively.

Wife neither finished high school nor obtained her general education degree ("GED"). Prior to, and for a short time during, the marriage, she "was a manager for a family cleaning business." (Tr. 291). She then briefly worked for Husband's family's business before the birth of the parties' first child in 1984. Thereafter, Wife stayed home and has remained unemployed.

During the late 1990s, Dr. Kristi Dickson, a general internist, began treating Wife for "abdominal pain and generalized muscular pain." (Tr. 166). Wife also complained of depression, anxiety, fatigue, "chronic sleep problems," "trouble sitting" for long periods of time, and "difficulty standing" for more than thirty minutes. (Tr. 175). Dr. Dickson diagnosed Wife with fibromyalgia, for which there is no cure. Dr. Dickson consistently treated Wife until January 9, 2004. Except for one visit on February 19, 2008, Dr. Dickson did not see or treat Wife after January of 2004. Wife also saw a gastroenterologist for "chronic intractable abdominal pain," which is abdominal pain over "a long period of time" that is "not responsive to treatment"; and a cardiologist for heart arrhythmia. (Tr. 167).

Husband is an admitted alcoholic and has been "in and out of rehab" approximately twenty times over the past twenty-five years. (Tr. 23). Husband took an unpaid leave of absence from his employment from January until May of 2007 after his

commercial driver's license was suspended due to a conviction for driving under the influence. During that time, he entered a "detox facility, rehab." (Tr. 86). Husband incurred approximately $3,000.00 in legal fees following his 2006 arrest. Husband also has incurred approximately $17,000.00 in medical bills due to his alcoholism.

On January 9, 2007, Wife filed a complaint in Lake Superior Court, seeking damages arising from an automobile accident on January 12, 2005. Husband was not a party to the complaint. On May 28, 2008, Wife entered into a settlement agreement release with the defendants in exchange for $18,000.00. Accordingly, the trial court dismissed the case on June 17, 2008.

On May 4, 2007, Husband filed a petition for dissolution. On August 27, 2007, the trial court accepted, as a provisional order, the parties' stipulation, which, inter alia, 1) gave Wife the exclusive use and possession of the parties' residence in Dyer; 2) required Husband to assume the responsibility for "[a]ll necessary and reasonable maintenance and repairs at the parties' residence"; and provided $300.00 per week for the support of Wife and then-minor D.R. (App. 39).

On October 1, 2007, Wife filed a petition for a contempt citation, alleging, among other things, that Husband had failed to perform the required maintenance and repairs to the marital residence. Wife filed an amended petition for a contempt citation on December 19, 2007. Following a hearing on February 8, 2008, the trial court found Husband in contempt. Thereafter, on March 14, 2008, Wife filed a counter-petition for dissolution, wherein she sought maintenance.

On July 1, 2008, the trial court entered its order as to its finding of contempt. The trial court ordered as follows:

> The parties are ordered to place the marital residence on the market for sale with a realtor to be agreed to by the parties. The realtor is to set out the work that is required to be completed, and [Husband] is ordered to make said repairs. Each party is entitled to have a witness present during the repairs.

(App. 57).

On July 29, 2008, Wife filed a second petition for a contempt citation, alleging that Husband had failed to make any of the repairs recommended by the realtor. On October 9, 2008, Husband filed a "Petition [f]or Listing Real Estate and Related Matters[.]" (App. 9). Following a hearing, the trial court entered an order on November 14, 2008. Regarding the marital residence, the trial court ordered as follows:

> 4. The Court orders that Frank Trapane of McColly Realtors in Crown Point, Indiana, shall be the realtor. The parties are to sign a listing agreement within ten (10) days.
>
> . . . .
>
> 6. Frank Trapane shall set the listing price and will list all repairs that are needed in order to list the house at market value.
>
> 7. In order to save trust monies, [Husband] will go to the marital residence in order to make the repairs he is capable of doing himself.
>
> 8. [Husband] will go to the marital residence to complete the repairs on October 25, 2008, at 9:00 a.m. and shall remain at the residence until October 26, 2008, at 2:00 p.m. He will also go to the marital residence to complete repairs on November 8, 2008, at 9:00 a.m. until November 9, 2008, at 2:00 p.m. If [Husband] cannot be available for any of these dates, he will then go to the marital residence to complete repairs on November 22, 2008, at 9:00 a.m. and stay until November 23, 2008, at 2:00 p.m.

(App. 64). Husband, however, did not complete all of the repairs suggested by the realtor.

On January 26, 2009, the trial court commenced a two-day final hearing. Wife requested special findings of fact and conclusions of law pursuant to Indiana Trial Rule 52.

On May 12, 2009, the trial court entered its decree of dissolution. Finding that Wife failed to "meet her burden of proof as to either a disability which renders her incapable of supporting herself or that she would benefit from temporary maintenance to acquire job skills through training or education," the trial court denied Wife's request for maintenance. (App. 26).

In addition, the trial court found Wife's settlement arising from her personal injury claim to be a marital asset, which it awarded to Wife. As to Wife's second petition for a contempt citation, the trial court "decline[d] to enter further sanctions . . . ." (App. 29).

The trial court further found that the "squandering of marital assets on alcohol and addiction treatment programs and the losses connected to [Husband]'s alcohol usage seem to have spanned the entire marriage and appear to have been to some degree acquiesced in by [Wife]." (App. 26). The trial court also found no dissipation related to the marital residence. Accordingly, the trial court declined to deviate from the presumptive equal division of marital property.

The trial court therefore ordered that the marital residence be sold, "the proceeds of said sale . . . to be divided equally between the parties . . . ." (App. 29). The trial court also awarded Wife $50,805.00 of the approximately $70,000.00 in Husband's retirement plan and ordered that the Husband's pension plan, valued at approximately $800,000.00 be "divided equally between the parties." (App. 30).

Wife filed a motion to correct error on June 11, 2009, and Husband filed a motion to correct error on June 12, 2009. The parties subsequently sold the marital residence, and on July 20, 2009, Husband filed a "Petition to Allocate Proceeds from the Sale of Marital Residence." (App. 5). The trial court held a hearing on the motions and petition on August 25, 2009, after which the parties entered into a partial agreed order. On or about September 30, 2009, the trial court entered its order on the remaining issues.

Additional facts will be provided as necessary.

DECISION

When a party has requested special findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), we may affirm the judgment on any legal theory supported by the findings. *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30, 36 (Ind. Ct. App. 2002), *trans. denied*. In reviewing the judgment, we first must determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Id.* Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. *Id.* The judgment will be reversed if it is clearly erroneous. *Id.* 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. *Id.* We will not reweigh the evidence or assess witness credibility. *Id.* Even though there is evidence to support it, a judgment is clearly erroneous if the reviewing court's examination of the record leaves it with the firm conviction that a mistake has been made. *Id.* A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. *Nienaber v. Nienaber*, 787 N.E.2d 450, 454 (Ind. Ct. App. 2003).

1. <u>Maintenance</u>

Wife asserts that the trial court abused its discretion in failing to award her spousal maintenance.

> The trial court's power to award spousal maintenance is wholly within its discretion, and we will reverse only when the decision is clearly against the logic and effect of the facts and circumstances of the case. "The presumption that the trial court correctly applied the law in making an award of spousal maintenance is one of the strongest presumptions applicable to the consideration of a case on appeal."

Spivey v. Topper, 876 N.E.2d 781, 784 (Ind. Ct. App. 2007) (internal citations omitted).

a. *Incapacity maintenance*

Wife maintains that the trial court abused its discretion in denying her maintenance "in light of the uncontroverted medical testimony regarding her disabilities and the lack of evidence regarding available employment options." Wife's Br. at 21. We disagree.

Regarding maintenance due to a spouse's incapacity, Indiana Code section 31-15-7-2(1) provides that

> [i]f the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court may find that maintenance for the spouse is necessary during the period of incapacity, subject to further order of the court.

A maintenance award, however, is not mandatory. *Cannon v. Cannon*, 758 N.E.2d 524, 527 (Ind. 2001).

Regarding Wife's purported physical incapacity, the decree of dissolution provides as follows:

> 30. [Wife] presented medical records and the testimony of Dr. Kristi Dickson as to [Wife]'s various physical incapacities.
>
> 31. The testimony indicated that [Wife] suffers from fibromyalgia, heart arrhythmia, irritable bowel syndrome, insomnia, anxiety and depression.
>
> 32. [Wife] testified that she has trouble sitting, standing or driving in a car for very long because of the fibromyalgia pain; she also asserts that the chronic pain would render her unable to do office work such as typing or computer data entry.
>
> 33. [Husband] presented testimony of [vocational] rehabilitation specialist Thomas Grzesik as to whether [Wife] is capable of holding a job; Mr. Grzesik gave his professional opinion that [Wife] is physically capable of a number of jobs that would provide gainful employment and earnings.
>
> 34. The Court notes that [Wife]'s medical testimony was primarily from a doctor who had not seen or treated [Wife] for four years prior to a visit in preparation for making a maintenance request. [Wife] presented no testimony from a physician currently treating her.
>
> 35. The Court noted [Wife]'s physical appearance in Court in making a determination of [Wife]'s request.

. . . .

> 37. The Court hereby finds that [Wife] has failed to meet her burden of proof as to . . . a disability which renders her incapable of supporting herself . . . . Therefore, [Wife]'s request for maintenance must be denied.

(App. 25-26).

Here, the parties presented extensive testimony and evidence regarding Wife's purported incapacity. Dr. Dickson testified that she diagnosed Wife with fibromyalgia in the mid-1990s after Wife reported "difficulty with just daily activities because of her pain"; difficulty driving "because of not being able to stay in a sort of constant seated position"; fatigue; and "chronic sleep problems." (Tr. 175). Dr. Dickson also testified that the various treatments and medications prescribed for Wife "haven't been well tolerated and haven't been terribly useful." (Tr. 184). Dr. Dickson opined that working would be "difficult" for Wife, and working a forty-hour work week would be "questionable." (Tr. 180, 181). Dr. Dickson, however, also testified that, with the exception of one examination in 2008, she had not seen or treated Wife since 2004.

Thomas Grzesik testified that as a vocational rehabilitation specialist, he "provide[s] evaluations and assessments to individuals with impairments resulting from injury or illnesses," (tr. 350), to determine their "employability and wage earning capacity." (Tr. 355). In this case, Grzesik interviewed Wife during a three-hour session on July 10, 2008, and administered vocational tests on July 21, 2008, and August 8, 2008. As part of his assessment, he also reviewed Wife's medical records.

Grzesik testified that while he does not refute Wife's diagnosis, he did refute Dr. Dickson's assertion that Wife "is not employable" because Dr. Dickson "is not an employment expert, not a vocational rehabilitation counselor, not a vocational counselor." (Tr. 375). Based on Wife's medical records, test scores, his observations, and Wife's responses during the interview, Grzesik opined that Wife is "employable . . . in a variety of entry level unskilled to semi-skilled occupations." (Tr. 389). He further testified that he has performed approximately two dozen evaluations of individuals diagnosed with fibromyalgia and found all of them employable to a certain extent. He also testified that "the Indiana Department of Vocational Rehabilitation Services" provides free services, including "job placement services," for "someone with fibromyalgia . . . ." (Tr. 394).

Our review of the record does not support Wife's contention that the findings of fact are clearly erroneous. Wife is asking us to reweigh the evidence, which we will not do. Accordingly, we find no error in the trial court's denial of maintenance for a physical or mental incapacity.

b. *Rehabilitative maintenance*

Wife also asserts that the trial court abused its discretion in not awarding maintenance "so that she could earn [an] education beyond an eleventh grade level." Wife's Br. at 29. We agree.

Indiana Code section 31-15-7-2(3) provides:

After considering:

(A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
(B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;
(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
(D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;
a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

As to Wife's request for rehabilitative maintenance, the trial court found as follows:

11. [Husband] is employed by the City of Chicago, earning approximately $100,000 per year. [Wife] is not employed outside the home.

12. [Wife] left high school after the eleventh grade, without receiving a diploma. She never pursued a GED diploma and she has no training in any skills which would enable her to secure gainful employment.

13. Prior to the parties' marriage, [Wife] worked as a manager of a dry cleaning business; during the marriage [Wife] was a stay-at-home mom; since the birth of the parties' first child [Wife] has been employed only part-time and sporadically in [Husband]'s family's business.

14. [Wife] took care of the parties' children and the parties' household throughout the marriage.

. . . .

> 36. The Court . . . notes that this action has been pending for almost two years, and [Wife] has made no apparent effort to acquire GED educational credentials or explore or enroll in any training program in order to get a job.

(App. 22-26).

Here, the evidence shows, and the trial court found, that Wife failed to obtain any education beyond the eleventh grade; and she interrupted her employment to pursue homemaking and child-rearing during the parties' nearly thirty-year marriage. Furthermore, for most of the parties' marriage, Husband has worked for the City of Chicago and earned approximately $100,000.00 in 2008.

Given the evidence presented as to the disparity in the earnings and earning ability of the parties, we find that the trial court improperly denied Wife rehabilitative maintenance. *See Dahnke v. Dahnke*, 571 N.E.2d 1278, 1281 (Ind. Ct. App. 1991) ("[W]hile the trial court has broad discretion in making its determination, an abuse of discretion will be found when the trial court . . . disregards evidence of factors listed in the controlling statute."), *trans. denied*. We therefore remand with instructions to calculate a reasonable award for rehabilitative maintenance pursuant to Indiana Code section 31-15-7-2(3).

2. Dissipation

Wife also asserts that the trial court abused its discretion in failing to find Husband's alcohol use and failure to make repairs to the marital residence constituted dissipation of marital assets. Thus, she argues that the trial court erred in not deviating from the presumptive equal division of marital assets.

"'Our court reviews findings of dissipation in various contexts under an abuse of discretion standard.'" *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 951 (Ind. Ct. App. 2006) (quoting *Goodman v. Goodman*, 754 N.E.2d 595, 598 (Ind. Ct. App. 2001)). "Thus, '[w]e will reverse only if the trial court's judgment is clearly against the logic and effect of the facts and the reasonable inferences to be drawn from those facts.'" *Id.*

"Dissipation generally involves the use or diminution of the marital estate for a purpose unrelated to the marriage and does not include the use of marital property to meet routine financial obligations." *Hardebeck v. Hardebeck*, 917 N.E.2d 694, 700 (Ind. Ct. App. 2009). "The test for dissipation of marital assets is 'whether the assets were actually wasted or misused.'" *Goodman*, 754 N.E.2d at 598 (quoting *Coyle v. Coyle*, 671 N.E.2d 938, 943 (Ind. Ct. App. 1996)). To determine whether dissipation has occurred, we consider the following factors:

> 1. Whether the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage;
>
> 2. The timing of the transaction;
>
> 3. Whether the expenditure was excessive or de minimis; and
>
> 4. Whether the dissipating party intended to hide, deplete, or divert the marital asset.

Kondamuri, 852 N.E.2d at 952. "[T]ransactions which occur during the breakdown of the marriage, just prior to filing a petition or during the pendency of an action, may require heightened scrutiny." *Coyle*, 671 N.E.2d at 943. "[I]f the non-dissipating party consented to the expenditure, a court should be less likely to find dissipation." *Bojrab v.*

Bojrab, 786 N.E.2d 713, 728 (Ind. Ct. App. 2003), *rev'd on other grounds*, 810 N.E.2d 1008 (Ind. 2004).

As to dissipation of assets, the trial court found as follows:

> 16. The parties are the owners of real estate consisting of the marital residence . . . . Said real estate has a present approximate value of between $199,000 and $229,000, depending on the completion of certain repairs and is subject to an outstanding mortgage debt in the approximate amount of $161,889.
>
> 17. At the outset of this action in the summer of 2007, the parties estimated that the house would be worth $280,000 if the needed repairs were made and the remodeling/refinishing work completed. This valuation is an illusory figure, as the house was never in a condition to warrant this listing price. [Husband] agreed to and then was ordered to complete the repairs and/or to pay for the repairs to ready the house to be sold, but he never complied with these orders. As of the emergency hearing on April 9, 2009, the repairs had not been completed. In the meantime, the real estate market has weakened substantially; the evidence and the court record in this case indicate that both parties contributed to the delay in getting the house ready to sell, both by [Husband]'s failure to complete the repairs and by [Wife]'s failure to remove the excess items stored in the garage and her failure to allow the house to be shown by the realtor. The parties' real estate broker now believes the house should be listed for $229,000, and it appears that the parties may end up selling it for between $199,000 and $215,000 in its present condition. As both parties are partially responsible for the delays, and neither party is responsible for the depressed state of the real estate market, the Court will not deem the drop in the value of the house to be a dissipation of assets by either party.
>
> . . . .
>
> 24. During the marriage, the parties also had a 1998 Buick, which [Husband] totaled in a drunk-driving accident in 2006. The Buick was worth approximately $1,790 before it was wrecked.
>
> 25. [Husband]'s 2006 drunk driving arrest also cost the parties approximately $30,000 in lost income during 2007, as [Husband] took a

> mandatory leave of absence from work while his license was suspended. This loss of income impacted the value of [Husband]'s pension.
>
> 26. [Wife] alleges that the lost income, lost pension value and lost Buick constitute dissipation of marital assets, as does the estimated $250,000 [Husband] spent on alcohol during the marriage and the unknown amount the parties spent for [Husband]'s minimum nineteen trips through alcohol rehabilitation treatment programs.
>
> . . . .
>
> 38. As to the dissipation issue, the Court hereby finds that [Husband] should be deemed to have received as part of his share of the marital property . . . the value of the Buick automobile he wrecked . . . . The squandering of marital assets on alcohol and addiction treatment programs and the losses connected to [Husband]'s alcohol usage seem to have spanned the entire marriage and appear to have been to some degree acquiesced in by [Wife].
>
> 39. The Court find that [Wife]'s request for a deviation from the presumptive equal division of property is not sufficiently supported by the circumstances and should be denied.

(App. 22-26).

a. *Failure to make repairs*

Wife argues that "the evidence shows that Husband dissipated marital assets when he failed to repair the marital residence." Wife's Br. at 37. As a result of Husband's failure to make timely repairs, she contends that "the value of the marital residence decreased dramatically" due to the deferred maintenance and delay in marketing the residence. *Id.*

The record shows that on November 14, 2008, the trial court appointed Frank Trapane as the parties' realtor for the purpose of listing the marital residence for sale.

The trial court instructed Trapane to list all the repairs he deemed necessary "in order to list the house at market value." (App. 64). In addition to ordering Husband to "make the repairs he is capable of doing himself," the trial court ordered the parties "to sign a listing agreement within ten (10) days." (App. 64).

During the hearing, Husband testified that he made some repairs to the marital residence but "[n]ot all." (Tr. 50). He also testified that he did not have adequate funds to purchase all of the materials required to make several repairs.

Trapane testified that he prepared a listing agreement for the marital residence and delivered it to Wife for her signature on or about December 3, 2008. He, however, "never then heard back" from her. (Tr. 315).

Trapane further testified that he valued the marital residence at between $199,000.00 and $229,000.00, depending on its condition. He testified that "to complete everything on the list" prepared by him pursuant to the trial court's order would cost between $20,000.00 and $25,000.00. (Tr. 317).

Regarding real estate values, Trapane testified that "[s]ince the end of 2006," the residential real estate market in Lake County has been "basically flat, if not declining . . . ." (Tr. 323). He, however, testified that the value of real estate in Dyer, where the marital residence is located, has "remained basically stable[.]" (Tr. 323).

Trapane also testified that in addition to recommending that Husband make repairs, he also recommended that Wife remove "all excess items" from the marital residence. (Tr. 330). Husband testified that he could not make many of the

recommended repairs until Wife removed several items from the marital residence. Wife testified that she made "very small efforts" to clean out the garage and admitted that she refused Husband's offer to clean out the garage. (Tr. 494). Wife also admitted that she cancelled one of the court-ordered weekends during which Husband was to make repairs.

Given the evidence in this case, we cannot say Wife has met her burden of showing that there should be an unequal division of marital assets due to Husband's failure to make repairs to the marital residence. The trial court ordered Husband to "make the repairs he is capable of doing himself." (App. 64). Husband testified that he made some repairs; could not afford to make other repairs; and that Wife prevented him from completing other repairs. Wife admittedly hindered Husband's ability to make some repairs. Wife also failed to sign the listing agreement as ordered by the trial court.

Trapane opined that the failure to make all of the recommended repairs to the marital residence would result in a reduction of the listing price by $30,000.00. He also testified that to hire a contractor to complete the repairs not made by Husband would cost between $20,000.00 and $25,000.00. Thus, the parties would realize little additional value from the repairs made to the residence.

As to any decrease in the martial residence's listing and selling price caused by Husband's delay in making repairs, Trapane testified that real estate values in Dyer had been stable, if not declining since 2006, one year prior to the filing of the petition for dissolution. Given these facts, we find no abuse of discretion in finding that Husband did not dissipate marital assets by failing to make timely repairs to the marital residence.

Additionally, we note that it appears that the parties sold the marital residence subsequent to the dissolution of the marriage.[1] It is unclear, however, the amount for which it sold. Thus, Wife has presented no evidence that Husband's failure to make repairs resulted in the diminution of the marital estate.

b. *Alcohol use*

Wife further contends that Husband "dissipated marital assets throughout the marriage due to his alcoholism." Wife's Br. at 40. Specifically, she maintains that he dissipated "approximately $250,000 towards the alcohol itself"; "spent an unknown amount of money on rehabilitations"; "dissipated marital assets when he totaled the parties' 1998 Buick automobile"; and lost income during 2007 due to his mandatory leave of absence. Wife's Br. at 40.

Again, in determining whether an inappropriate dissipation of assets has occurred, the trial court should consider several factors, including the timing of transactions and whether the dissipating party "intended to hide, deplete, or divert the marital asset." *Bojrab*, 786 N.E.2d at 727. "If a party's intent was to hide, deplete or divert marital assets, that intent is relevant to the trial court's determination of dissipation." *Id.* at 727-28. Furthermore, "'transactions which are remote in time and effect, and where many years of marriage have intervened, may be deemed insignificant, while transactions which occur during the breakdown of the marriage, just prior to filing a petition or during

[1] An order dated August 25, 2009, states that there are monies being held in a trust account "from the sale of the marital residence" in addition to "[d]ollars still due from the real estate sales proceeds held in escrow with the title company . . . ." (App. 163).

the pendency of an action, may require heightened scrutiny.'" *Id.* at 728 (quoting *Coyle*, 671 N.E.2d at 943).

Here, the trial court found as follows:

> 24. During the marriage the parties also had a 1998 Buick, which [Husband] totaled in a drunk-driving accident in 2006. The Buick was worth approximately $1,790 before it was wrecked.
>
> 25. [Husband]'s 2006 drunk driving arrest also cost the parties approximately $30,000 in lost income during 2007, as [Husband] took a mandatory leave of absence from work while his driver[']s license was suspended. This loss of income also impacted the value of [Husband]'s pension.
>
> 26. [Wife] alleges that the lost income, lost pension value and lost Buick constitute dissipation of marital assets, as does the estimated $250,000 [Husband] spent on alcohol during the marriage and the unknown amount the parties spent for [Husband]'s minimum nineteen trips through alcohol rehabilitation treatment programs.
>
> . . . .
>
> 38. . . . The squandering of marital assets on alcohol and addiction treatment programs and the losses connected to [Husband]'s alcohol usage seem to have spanned the entire marriage and appear to have been to some degree acquiesced in by [Wife].

(App. 24-26).

Husband admitted that he is an alcoholic and had entered various rehabilitation programs "[e]ighteen, nineteen times" over the past twenty-five years. (Tr. 23). Wife testified that during the course of the marriage, Husband spent "[t]wenty-five dollars probably a day in alcohol." (Tr. 455).

In 2006, Husband wrecked the parties' vehicle while drinking under the influence of alcohol. As a result of this incident, Husband incurred legal fees and had his commercial driver's license suspended, which prevented him from working for approximately five months.

Here, the evidence reveals that Husband's alcohol abuse spanned nearly the entirety of the parties' marriage, which suggests that he was not depleting the parties' assets in anticipation of the parties' dissolution. As to Husband's rehabilitation, Wife presented no evidence that she opposed diverting marital assets to Husband's treatment.

As to the dissipation of marital assets due to Husband's arrest, Wife presents no evidence regarding Husband's intent. Also, Husband's arrest occurred the year prior to the filing of the petition for dissolution. We therefore find no abuse of discretion in the trial court's determination that losses due to Husband's alcoholism constitute dissipation.[2]

3. Contempt

Wife further argues that the trial court abused its discretion by not holding Husband in contempt for failure to make repairs to the marital residence. "'Contempt of court involves disobedience of a court which undermines the court's authority, justice, and dignity.'" *Srivastava v. Indianapolis Hebrew Congregation, Inc.*, 779 N.E.2d 52, 60 (Ind. Ct. App. 2002) (quoting *Carter v. Johnson*, 745 N.E.2d 237, 240 (Ind. Ct. App.

[2] We note that Wife relies on several out-of-state cases in support of her proposition that a spouse's alcoholism should be considered in determining whether that spouse had dissipated assets. These authorities, however, do not control; furthermore, we cannot say that Indiana lacks controlling authority on dissipation of marital assets.

2001)), *trans. denied*. "It includes any act which tends to deter the court from the performance of its duties." *Id.*

A person can be held in indirect contempt of court for the willful disobedience of any order lawfully issued:

> (1) by any court of record, or by the proper officer of the court;
> (2) under the authority of law, or the direction of the court; and
> (3) after the process or order has been served upon the person[.]

Ind. Code § 34-47-3-1.

> To be held in contempt for failure to follow the court's order, a party must have willfully disobeyed the court order. The order must have been so clear and certain that there could be no question as to what the party must do, or not do, and so there could be no question regarding whether the order is violated. A party may not be held in contempt for failing to comply with an ambiguous or indefinite order. Otherwise, a party could be held in contempt for obeying an ambiguous order in good faith. The determination of whether a party is in contempt of court is a matter left to the discretion of the trial court. We will reverse a trial court's finding of contempt only if there is no evidence or inference therefrom to support the finding.

Whitaker v. Town of Cloverdale Town Council, 902 N.E.2d 885, 887-88 (Ind. Ct. App. 2009) (internal citations omitted).

On July 1, 2008, the trial court in this case ordered Husband to make repairs to the marital residence. On July 29, 2008, Wife filed a second petition for a contempt citation, alleging that "[H]usband had failed to complete the repairs to the marital residence or pay for same." (App. 59). On November 14, 2008, the trial court ordered Husband "to make the repairs <u>he is capable of doing himself</u>" and set forth specific dates and times during which Husband was to make the repairs. (App. 64) (emphasis added). On April 9, 2009,

the trial court held an emergency hearing, at which time "the repairs had not been completed." (App. 23). Thereafter, the trial court entered an emergency order.[3]

In the decree of dissolution, the trial court found as follows:

> [Wife]'s second petition for contempt, filed July 29, 2008, regarding the repairs on the marital residence, is still unresolved. In light of the ongoing conflict over [the] sale of the house, and the Emergency Order entered by the Court on April 9, 2009, the Court hereby declines to enter further sanctions on [Wife']s second petition for citation.

(App. 29).

Here, the evidence does not support a finding of contempt. The July 1, 2008 order does not set forth a date by which the repairs were to be completed. The subsequent order directs Husband to make only those repairs he is "capable of doing himself." (App. 64). We cannot say that either order is "so clear and certain that there could be no question as to what [Husband] must do . . ." or the time by which he must do it. *See Whitaker*, 902 N.E.2d at 887 ("A party may not be held in contempt for failing to comply with an ambiguous or indefinite order."). Accordingly, we find no abuse of discretion in denying Wife's petition for contempt.

4. <u>Division of Marital Estate</u>

Wife asserts that the trial court improperly divided the marital estate. Specifically, she argues that the trial court abused its discretion in including her personal injury settlement in the marital estate and in not deviating from the presumptive equal division of marital assets in her favor.

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[3] The parties have not provided a copy of this emergency order.

The division of marital assets is within the trial court's discretion, and we will reverse only for an abuse of discretion. *DeSalle v. Gentry*, 818 N.E.2d 40, 44 (Ind. Ct. App. 2004). A party challenging the trial court's division of marital property must overcome a strong presumption that the trial court "considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal." *Id.* "We may not reweigh the evidence or assess the credibility of the witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property." *Id.*

a. *Personal injury settlement*

Wife contends that the trial court improperly included her settlement proceeds in the marital estate because the settlement is not a marital asset. We agree.

In dividing marital property, the trial court first must determine what property must be included in the martial estate. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *trans. denied*. Indiana Code section 31-15-7-4(a) provides as follows:

> In an action for dissolution of marriage . . . the court shall divide the property of the parties, whether:
>
> (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.

Thus, only property acquired by an individual spouse after the final separation date is excluded from the marital estate. *O'Connell v. O'Connell*, 889 N.E.2d 1, 11 (Ind. Ct. App. 2008); *see also Granzow v. Granzow*, 855 N.E.2d 680, 684 (Ind. Ct. App. 2006) ("[T]he determinative date when identifying marital property subject to division is the date of final separation, in other words, the date the petition for dissolution was filed."). "[A] tort claim for personal injury which has not been reduced to a judgment has no readily ascertainable value and is not marital property capable of division <u>at the time of dissolution</u>." *Dusenberry v. Dusenberry*, 625 N.E.2d 458, 462 (Ind. Ct. App. 1993) (emphasis added).

In this case, Wife filed a complaint for damages arising from an automobile accident in January of 2007. Husband filed the petition for dissolution on May 4, 2007. On May 28, 2008, Wife entered into a settlement agreement for $18,000.00. The trial court subsequently found the settlement to be a marital asset.

Because Wife's tort claim had not been reduced to a judgment on the date the petition for dissolution was filed, the settlement proceeds should not have been included in the marital estate. We therefore remand to the trial court with instructions to exclude the settlement proceeds from the marital estate and to recalculate the division of marital property accordingly.

b. *Distribution of marital property*

Wife also argues that the trial court abused its discretion by not deviating from the presumptive equal division of martial property. She asserts that she is entitled to "a

greater share of the liquid marital assets" due to the parties' disparate earning abilities. Wife's Reply Br. at 17.

Again, the "division of marital property in Indiana is a two-step process." *Thompson*, 811 N.E.2d at 912. After determining what property must be included in the marital estate, the trial court must then divide the marital property under the statutory presumption that an equal division of marital property is just and reasonable. *Id.* The trial court, however, may deviate from this presumption. *Chase v. Chase*, 690 N.E.2d 753, 756 (Ind. Ct. App. 1998).

Indiana Code section 31-15-7-5 provides:

> [T]his 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 dividing marital property, the trial court must consider all of these factors, but it is not required to explicitly address all of the factors in every case." *Montgomery v. Faust*, 910

N.E.2d 234, 239 (Ind. Ct. App. 2009). Rather, we presume that the trial court considered all of these factors. *Id.* "This is one of the strongest presumptions applicable to our consideration on appeal." *Id.*

Here, the trial court found that Husband is employed and earned approximately $100,000.00 in 2008. As to Wife, the trial court found that she "left high school after the eleventh grade, without receiving a diploma"; "never pursued a GED diploma"; and "has no training in any skills which would enable her to secure gainful employment." (App. 22). The trial court also found that Husband was the primary wage-earner during the marriage while Wife "took care of the parties' children and the parties' household throughout the marriage." (App. 22). Despite these findings, the trial court decreed that Wife's request for a deviation from the presumptive equal division of property be denied.[4] We, however, find no abuse of discretion in this case as it is clear from the dissolution decree that the trial court did in fact deviate from the presumptive equal division of property in Wife's favor.

We note that marital property includes both assets and liabilities. *McCord v. McCord*, 852 N.E.2d 35, 45 (Ind. Ct. App. 2006), *trans. denied*. "Thus, '[i]n making a division of marital property, the court properly considers the separate property rights of the parties as well as all debts of the parties.'" *Id.* (quoting *White v. White*, 425 N.E.2d 726, 728 (Ind. Ct. App. 1981)).

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[4] As to the remaining factors, the trial court found no dissipation of assets, and neither party presented evidence of property acquired before the marriage, through inheritance, or as a gift.

Regarding the parties' debts, the trial court found as follows:

> 43. The parties have various debts outstanding from the marriage, and that said debts should be assigned equitably between the parties by the Court.
>
> 44. Other than the aforementioned real estate mortgage, the parties have outstanding marital debts; however, the evidence was unclear as to how much debt remains.
>
> 45. [Husband]'s evidence indicates that there is remaining marital debt of a medical nature in the approximate amount of $17,336.50 and non-medical debts in the approximate amount of $25,298.
>
> 46. [Wife]'s evidence shows that the remaining marital debt totals $2,087.
>
> 47. It is equitable for the Court to assign marital debts to the party with the income with which to pay said debt.
>
> 48. [Husband] should assume and be responsible for the following of the parties' debts and shall hold [Wife] harmless therefrom:
> . . . .
> b. all outstanding medical related marital debts incurred prior to the date of this order in this matter.
> c. all outstanding non-medical marital debts incurred prior to the date of this order in this matter.

(App. 27-28). The trial court therefore assigned all of the marital debt to Husband.

Reading the decree of dissolution as a whole, Wife's attack on the division of marital property must fail as the trial court did make an unequal division in her favor. We find no error in the division of the marital estate.[5]

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[5] As to Wife's contention that she is entitled to "a greater share of the liquid marital assets," Wife's reply br. at 17, we consider the trial court's disposition of marital property as a whole, not item by item. *Hill v. Hill*, 863 N.E.2d 456, 462 (Ind. Ct. App. 2007).

6. Appellate Attorney Fees

Finally, Wife requests that this court remand this case to the trial court to determine whether she is entitled to appellate attorney fees. Indiana Code section 31-15-10-1(a) provides that "[t]he 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 . . . after entry of judgment." Thus, the trial court "retains jurisdiction to award appellate attorney fees even after the perfection of the appeal." *Thompson*, 811 N.E.2d at 929. We therefore remand the matter to the trial court for a determination of whether an award of appellate attorney fees is appropriate.

In conclusion, we reverse the trial court's denial of rehabilitative maintenance to Wife and remand with instructions to calculate an award of rehabilitative maintenance; we remand with instructions to exclude the settlement proceeds from the marital estate and to recalculate the division of marital property accordingly; and we remand to the trial court the issue of whether Wife shall be awarded appellate attorney fees. In all other aspects, we affirm the trial court's judgment.

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

BRADFORD, J., and BROWN, J., concur.