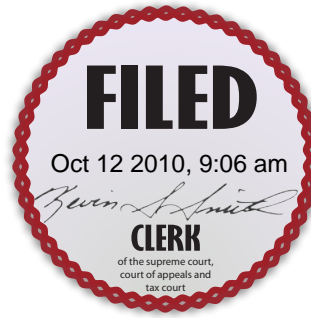


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH PAIRSH,)
)
Appellant-Defendant,)
)
vs.) No. 18A02-1002-DR-151
)
ANNETTE PAIRSH,)
)
Appellee-Plaintiff.)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0906-DR-68

October 12, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kenneth Pairsh appeals the trial court's denial of his request for spousal maintenance and its distribution of marital property. We affirm.

Issues

Kenneth raises two issues, and Annette Pairsh, Kenneth's ex-wife, raises two additional issues on cross-appeal. We consolidate and restate the issues as:

- I. whether the trial court properly denied Kenneth's request for spousal maintenance;
- II. whether Kenneth was entitled to more than 50% of the marital estate; and
- III. whether Annette is entitled to appellate attorney fees.

Facts

Kenneth and Annette were married in 1977 and separated on April 3, 2009. On June 18, 2009, Annette filed a dissolution petition. Kenneth appeared pro se and requested spousal maintenance in the amount of \$200 per week to supplement his Social Security income because he was "unable to obtain gainful employment due to poor health and his age." App. p. 72. A final hearing was held on December 2, 2009, at which Kenneth asked for spousal maintenance in the amount of \$400 per month. Although he testified, Kenneth did not present any other evidence at the hearing.

On December 4, 2009, the trial court issued an order granting the dissolution, denying Kenneth's request for spousal maintenance, and ordering a 50/50 split of the marital estate. On January 4, 2010, Kenneth filed a motion to correct error arguing that he did not realize the final hearing was a final hearing and attempting to supplement the

record. On January 19, 2010, the trial court denied Kenneth's motion to correct error. Kenneth then hired an attorney and now appeals.

Analysis

I. Spousal Maintenance

Kenneth argues that the trial court improperly denied his request for 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." Spivey v. Topper, 876 N.E.2d 781, 784 (Ind. Ct. App. 2007). Kenneth appears to argue that he was entitled to spousal maintenance pursuant to Indiana Code Section 31-15-7-2(1), which provides:

If 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.

To establish he is incapacitated, Kenneth points to his own statements during the provisional and final hearings, evidence submitted with his motion to correct error, and the fact that the trial court was aware of the seriousness of his injuries from an unrelated prior case. Even assuming there was sufficient evidence to support a finding that he was physically incapacitated, the statute permitted, but did not require, the trial court to order Annette to pay spousal maintenance. See Ind. Code § 31-15-7-2(1).

Kenneth contends that spousal maintenance is warranted because his monthly expenses exceed his Social Security income of \$728 per month.¹ He also asserts, based on his own pleading, that Annette's income is approximately \$4,000 per month. Contrary to this assertion, Annette testified that her take home pay was between \$2,500 and \$2,700 per month. Even if Annette's income supported an award of spousal maintenance, the evidence showed that immediately prior to the parties' separation, Kenneth attacked Annette, pulled a gun on her, and threatened to kill her. Under these circumstances, it was within the trial court's discretion to deny Kenneth's request for spousal maintenance.

II. Distribution of Property

Kenneth also argues that the trial court improperly distributed the marital estate. Indiana law requires that marital property be divided in a "just and reasonable manner," and provides for the statutory presumption that "an equal division of the marital property between the parties is just and reasonable." Fobar v. Vonderahe, 771 N.E.2d 57, 58-59 (Ind. 2002) (quoting I.C. § 31-15-7-5). This presumption may be rebutted by evidence of each spouse's contribution to the acquisition of the property, the extent to which the property was acquired before the marriage or by inheritance, the economic circumstances of each spouse, the conduct of the parties relating to the disposition or dissipation of assets, and each spouse's earning ability. Id. at 59 (citing I.C. § 31-15-7-5). "The division of marital assets is within the dissolution court's discretion, and we will reverse only for an abuse of discretion." Hardebeck v. Hardebeck, 917 N.E.2d 694, 700 (Ind. Ct. App. 2009).

¹ Kenneth testified that Social Security he received was related to his retirement.

Kenneth first argues that he was entitled to at least half of Annette's retirement accounts. Annette testified, "I really don't have any retirement money." Tr. p. 103. She explained that at one point she had \$2,500 in a state teacher retirement fund in Illinois but that since the "market crashed, that investment dropped." Id. at 102. She also testified that she had \$500 in another account but used it to pay bills because Kenneth was not working. Finally, she stated that she had only begun receiving retirement benefits from her current employer and that what little bit she did have "went into the red" when the "economy crashed." Id. at 102-03.

Kenneth claims that the trial court should not have taken Annette at her word regarding the value of the retirement accounts. He argues that he attempted to subpoena information from Annette but could not because he was not an attorney and could not afford to hire one. He also claims that he did not understand the trial court's use of the term "supplementation of the evidence" in a telephonic conference conducted on December 1, 2009, the day before the final hearing. App. p. 5. He argues that we should consider the evidence submitted with his motion to correct error as his "supplementation of evidence." Appellant's Br. p. 9.

Although Kenneth is represented by counsel on appeal, he proceeded pro se before the trial court. Kenneth cannot take refuge in the sanctuary of his amateur status. Peters v. Perry, 873 N.E.2d 676, 677-78 (Ind. App. Ct. 2007). We have repeatedly observed that a litigant who chooses to proceed pro se will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his or her actions. Id. at 678. The fact that Kenneth was confused and unprepared for the final

hearing is not a basis for relief on appeal. Kenneth's attempts to supplement the record on appeal are unavailing.

To the extent the retirement accounts are an asset of the marital estate, the trial court offset the award of those accounts to Annette when it ordered her to pay her own medical bills, totaling \$4,245. Kenneth has not established that the trial court abused its discretion when it awarded Annette her retirement accounts while at the same time ordering her to pay her own medical bills.

Kenneth also argues that the trial court improperly split the marital assets and debts 50/50. He argues he should have been awarded at least 70% of the marital estate. In support of his argument, Kenneth claims that Annette received a much more valuable asset when it awarded her the 2001 Dodge Intrepid and awarded him the 1984 Mercury Grand Marquis, which was "totaled and worth nothing." Appellant's Br. p. 10. Contrary to Kenneth's argument, the trial court awarded him the proceeds from the insurance claim on the 1984 Grand Marquis. At the final hearing Kenneth stated that he received \$947 in insurance proceeds and provided no evidence as to the value of the Intrepid. The trial court was within its discretion to divide this property in this manner.

Kenneth also makes a brief argument that he was entitled to receive more property and pay less debt because the couple's house in Illinois was purchased with funds from his mother. Annette testified that Kenneth's mother gave him \$2,000 of the \$20,000 used to purchase the house in 1986. The remaining \$18,000 came from the sale of another house the couple jointly owned. She also testified that she put "sweat equity" into the house. Tr. p. 62. It appears that the couple lived there with their children until 2003.

Based on this evidence, Kenneth has not established that a deviation from the 50/50 presumption was warranted.

Regarding the debts, Kenneth claims that he was unaware of some of the debts and that he should be able to use the equity from the sale of the parties' house in Illinois to support himself during his retirement, not to repay debts. This is nothing more than a request to reweigh the evidence, which we will not do. See England v. England, 865 N.E.2d 644, 648 (Ind. Ct. App. 2007) (“We will not reweigh the evidence or assess the credibility of the witnesses and will consider the evidence in the light most favorable to the judgment.”), trans. denied. Kenneth did not rebut the presumption that a 50/50 split of the marital estate was proper.

III. Appellate Attorney Fees

On cross-appeal, Annette argues that she is entitled to appellate attorney fees pursuant to Indiana Appellate Rule 66(E) or Indiana Code Section 31-15-10-1. “The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees.” Ind. Appellate Rule 66(E). Our discretion to award attorney fees under this rule is limited to circumstances when the appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. Wholesalers, Inc. v. Hobson, 874 N.E.2d 622, 627 (Ind. Ct. App. 2007). Although this rule provides us with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

Requests for awards of appellate attorney fees have been categorized as “procedural,” for flagrant violations of appellate procedure, and “substantive,” for appellate arguments that are utterly devoid of all plausibility. Wholesalers, 874 N.E.2d at 627. Annette’s argument is considered “substantive” based on her claim that the issues raised by Kenneth lack merit, are frivolous, and are made in bad faith. Although Annette’s argument gives us pause given the lack of evidence offered to the trial court by Kenneth, we decline to award attorney fees under Appellate Rule 66(E) because we are mindful of the possible chilling effect.

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.

To the extent that this provision permits us to remand for the award of appellate attorney fees, we decline to do. In the dissolution order, the trial court denied Annette’s request for \$1,000 toward her attorney fees based on the parties’ relative incomes. For this same reason, we decline to remand for the trial court to assess appellate attorney fees.

Conclusion

The trial court did not abuse its discretion in declining to award spousal maintenance to Kenneth or in equally distributing the marital estate. We decline to award attorney fees to Annette or to remand for the award of attorney fees. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.