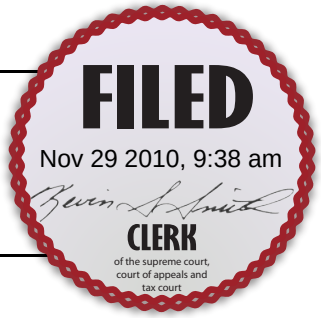
ATTORNEY FOR APPELLANT:

ERIC C. BOHNET
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

ELIZABETH BASHAW BYBEE
Anderson, Indiana



IN THE COURT OF APPEALS OF INDIANA

BRUCE D. SEAL,
)
Appellant-Respondent,
)
vs.
) No. 48A04-0912-DR-750
LORI L. SEAL,
)
Appellee-Petitioner.

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Special Judge
Cause No. 48D03-0903-FA-88

November 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Bruce D. Seal appeals the trial court's order awarding a pension plan and attorney's fees to Lori L. Seal, his then-wife, upon their dissolution of marriage. He raises two issues for our review, which we restate as whether the trial court abused its discretion by awarding the pension plan solely to Lori, and whether the trial court abused its discretion by awarding attorney's fees to Lori. Concluding the trial court erred by not stating its reasons for awarding the pension plan solely to Lori, but did not abuse its discretion by awarding attorney's fees to Lori, we reverse and remand in part and affirm in part.

Facts and Procedural History

Bruce and Lori were married in 1985 and separated in January 2008. Lori filed for dissolution of marriage later in 2008, and litigation over property division ensued. Prior to a final trial court hearing in October 2009, the parties reached a partial settlement to allocate all of their debts and most of their property. At issue in the trial court and on appeal is allocation of Lori's pension earned through the Southern California United Food & Commercial Workers Union and Food Employers Joint Pension Trust Fund ("Pension") and Bruce's partial payment of Lori's attorney's fees. The relevant facts follow.

During Bruce and Lori's marriage and while residing in California, Lori was a participant in the Pension from 1994 to August 2003. According to the Pension's custodian of records, Lori "has established a vested pension," the amount of which will be determined at the time of her retirement and is dependent upon her age at retirement. Appendix of

Appellant at 21. If she retires at age fifty, her monthly benefit amount would be $212.47; if she retires at age sixty, her monthly benefit amount would be $408.60.

Bruce is trained as an engineer and worked for several years with aircraft in California. Since then he has worked as a cabinetmaker and various other jobs. From February 1998 to February 2005 Bruce was unemployed. Bruce testified he homeschooled their children[1] during that time although Lori testified she wanted him to work. At the time of the October 2009 trial court hearing, Bruce had been unemployed for four months; Lori held two jobs to earn a total of approximately $41,000 per year.

In the course of the dissolution of marriage proceedings, Bruce undertook several litigation maneuvers that the trial court deemed unnecessary and an "expensive procedural strategy." Id. at 13. These tactics included request for removal in August 2008, Petition for Writ of Mandamus (denied by the Indiana Supreme Court in March 2009), motion for a judge to recuse himself in April 2009 (which was granted), motion for change of venue seeking a different judge in May 2009 (which was denied), Petition for Writ of Mandamus (denied by the Supreme Court in July 2009), and repeated continuances.

The trial court awarded the Pension solely to Lori, and ordered Bruce to pay Lori $2,000.00 in attorney's fees. Neither party requested nor did the trial court enter specific findings of fact. Bruce now appeals.

[1] Bruce and Lori together have four children who are all above the age of majority and irrelevant to this appeal.

Discussion and Decision

I. Pension Plan

A. Standard of Review

We apply a clearly erroneous or abuse of discretion standard of review to property division upon dissolution of marriage. Chase v. Chase, 690 N.E.2d 753, 755 (Ind. Ct. App. 1998). A party challenging the property division must overcome the presumption that the trial court made all proper considerations and complied with the law, which is "one of the strongest presumptions applicable to our consideration on appeal." Wilson v. Wilson, 732 N.E.2d 841, 844 (Ind. Ct. App. 2000), trans. denied. "We will reverse a property distribution only if there is no rational basis for the award; that is, if the result reached is clearly against the logic and effect of the facts and circumstances before the court, including the reasonable inferences to be drawn therefrom." Id. We will not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's decision. Chase, 690 N.E.2d at 755. Even if "the same circumstances may have justified a different property distribution[,] [we cannot] substitute our judgment for that of the divorce court." Wilson, 732 N.E.2d at 844.

B. Allocating the Pension Plan

Bruce argues the Pension should be divided equally because the Pension was earned in California where state law requires equal division, it was earned and vested during the marriage, and the trial court did not state its reasons for unequal division. We address each of these arguments in turn.

Bruce's argument the Pension must be divided equally according to California law fails because regardless of where the parties acquired property during their marriage, the division of their property upon dissolution of their marriage in Indiana is governed by Indiana law. Our supreme court decided in 1831 that Indiana law governs divorce proceedings in Indiana. Tolen v. Tolen, 2 Blackf. 407, 411 (Ind. 1831).

In support of his argument that the Pension should be divided equally because it was earned and vested during the marriage, Bruce refers us to Maxwell v. Maxwell, 850 N.E.2d 969 (Ind. Ct. App. 2006), trans. denied. In particular, he points to our statement that "[o]nly property acquired by a spouse after the final separation date is excluded from the marital estate." Id. at 973. We agree that the Pension should be included in the marital estate, for all assets acquired during the marriage are part of the marital estate and subject to division. Gnerlich v. Gnerlich, 538 N.E.2d 285, 288 (Ind. Ct. App. 1989), trans. denied. Contrary to Bruce's assertion, however, we conclude based on the record the trial court did include the Pension in the marital estate.

The remainder of our discussion in Maxwell is also instructive and applicable to this case. In Maxwell, a woman appealed the trial court's division of property, claiming the trial court erred in excluding numerous shares of stock and an IRA inheritance from the marital estate and awarding them to her then-husband. In addition to the above, we stated:

> Taken as a whole . . . the findings and conclusions clearly demonstrate that the trial court considered the . . . shares of stock and IRA as marital property, but that the facts and circumstances justified a deviation from a 50-50 split of the marital estate to effectively award the entire value of those assets to [Husband].

850 N.E.2d at 973.

Similarly, in the present case, the record taken as a whole clearly demonstrates the trial court considered the Pension to be marital property, but determined the facts and circumstances justified deviation from an even split, effectively awarding the entire value of the Pension to Lori. The trial court noted that "the Parties have already divided most of their personal property," and then addressed the division of property issues before the court – family photos and the Pension. App. of Appellant at 12. Lori testified that Bruce decided – against her wishes – not to work for an extended period of time during their marriage. In addition, the record supports an inference that Bruce is argumentative and refused to work for many years during the marriage, but includes conflicting evidence as to his contribution to the family institution as a homemaker.

It is important to clarify that Bruce's lack of financial contribution to the family institution alone does not lead us, and should not lead trial courts, to conclude that non-financial family contributions are worthless. To the contrary, the General Assembly has long recognized and encouraged consideration of family contributions "regardless of whether the contribution was income producing." Ind. Code § 31-15-7-5. We share in this sentiment. See, e.g., Temple v. Temple, 435 N.E.2d 259, 262 (Ind. Ct. App. 1982). However, here, the trial court apparently assessed credibility, weighed evidence, and found that Bruce did not contribute to the family in non-income producing ways or produce income.

Bruce argues the trial court committed reversible error by not explicitly stating its reasons for deviating from the statutory presumption of equal division of the Pension. We

agree. While we may assume the trial court awarded the Pension solely to Lori because its weighing of the evidence and judgment of credibility led it to find that Bruce did not contribute to the family financially or otherwise for an extended period of time during the marriage, our assumption that they are the reasons of the trial court is not enough. The law requires a trial court to state its reasons for deviating from the presumption of equal division. Schueneman v. Shueneman, 591 N.E.2d 603, 608 (Ind. Ct. App. 1992); R.E.G. v. L.M.G., 571 N.E.2d 298, 301 (Ind. Ct. App. 1991). The trial court abused its discretion by not stating its reasons for awarding the entire Pension to Lori and thereby unequally "dividing" the Pension.

For the reasons stated, we reverse and remand the trial court's award of the Pension solely to Lori because it did not state its reasons for doing so.

II. Attorney's Fees

A. Standard of Review

A trial court has broad discretion to award or deny attorney's fees in actions for dissolution of marriage. Russell v. Russell, 693 N.E.2d 980, 984 (Ind. Ct. App. 1998), trans. denied. We review an award of attorney's fees for an abuse of discretion. Williams v. Williams, 460 N.E.2d 1226, 1228 (Ind. Ct. App. 1984). "We will only reverse the trial court's decision if the award is clearly against the logic and effect of the facts and circumstances before the court." Meade v. Levett, 671 N.E.2d 1172, 1179 (Ind. Ct. App. 1996).

B. Award of Attorney's Fees

Indiana law regarding the award or denial of attorney's fees in dissolution of marriage proceedings 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 . . . ." Ind. Code § 31-15-10-1(a).

In determining the amount of attorney's fees to award, if any, courts may consider "the resources of the parties, the relative earning ability of the parties, . . . other factors which bear on the reasonableness of the award[,] . . . . any misconduct on the part of one of the parties which directly results in the other party incurring additional fees," Meade, 671 N.E.2d at 1179 (citations omitted), the "ability to engage in gainful employment, and [the] ability to earn an adequate income." Webb v. Schleutker, 891 N.E.2d 1144, 1156-57 (Ind. Ct. App. 2008).

Bruce acknowledges that attorney's fees may be awarded for misconduct, but disputes that his litigation conduct merits such an award. He distinguishes "simply pursuing tactics or strategies that proved costly and unsuccessful" from "actual misconduct such as falsely alleging sexual abuse of children . . . or . . . violating multiple court orders." Brief of Appellant at 7. For support of this distinction, Bruce directs us to Jenkins v. Jenkins, 567 N.E.2d 136 (Ind. Ct. App. 1991). In Jenkins we reversed a trial court's award of attorney's fees where the trial court record did not reveal the basis for the award. We concluded that "an award of attorney's fees cannot rest solely on a determination by the trial court that the case is unmeritorious or malicious," id. at 140, and that "[s]uch an award must be predicated

upon evidence of the financial circumstances of the parties." Id. at 141. Therefore, Bruce seems to argue Jenkins requires an award of attorney's fees in dissolution of marriage proceedings be based solely on the parties' financial circumstances or in combination with abhorrent litigation conduct.

We disagree, and read Jenkins to mean that conduct, particularly the pursuit of costly litigation tactics, may be a basis for an attorney's fees award in dissolution of marriage cases so long as a trial court also considers and predicates the award on the parties' financial circumstances. This holding is consistent with trial court's authority to award attorney's fees in the interest of fairness and justice. See Crowe v. Crowe, 247 Ind. 51, 55-56, 211 N.E.2d 164, 167 (1965) ("[A] court has inherent authority to make allowances for attorney fees in a hearing for support or suit money in the interest of seeing that equity and justice is done on both sides."). Jenkins does not hold that financial circumstances must be the sole basis for an attorney's fees award. Fairness and the truth-seeking function of courts encourage efforts – within the boundaries of the law – to mitigate the degree to which litigation is affected by parties' financial strength or weakness. See, e.g., Stigall v. Stigall, 151 Ind. App. 26, 46, 277 N.E.2d 802, 812 (1972) (discussing attorney's, judges', and justices' "obligation never to lose sight to [sic] what is just and reasonable" as to attorney's fees and access to courts).

Our holding here also supports the commonly-mentioned purpose of the attorney's fees statute – to ensure the party receiving the benefit is sufficiently able to engage in costly litigation. See, e.g., Mosser v. Mosser, 729 N.E.2d 197, 201 (Ind. Ct. App. 2000) ("In a

dissolution of marriage action, the statute allowing the award of attorney's fees is meant to insure equal access to the courts.").

It is also worth clarifying that although one party may have greater financial resources or stability relative to the other, courts are not precluded from ordering attorney's fees paid to the relatively more stable party based on the litigation conduct of the relatively less stable party. In part, this is because, as we stated in Webb, courts may also consider parties' "ability to engage in gainful employment, and ability to earn an adequate income." 891 N.E.2d at 1156-57 (emphases added). Further, the fact that attorney's fees were not awarded while the litigation was pending does not preclude their award at the conclusion of the matter. See Macauley v. Funk, 172 Ind. App. 66, 72, 359 N.E.2d 611, 614-15 (1977) (affirming an award of attorney's fees in a trial court's final order).

Here, the trial court heard testimony as to the parties' financial circumstances and Bruce's litigation tactics that were aggressive and costly to defend against. The trial court also heard testimony that Bruce was able to be employed and had substantial experience in the engineering field where he was able to earn an adequate income, but refused to seek employment. Therefore, the record supports the inferences that Bruce was able to work and earn an adequate income and his litigation conduct merits an award of attorney's fees to Lori.

Based on the record and our discussion above, the trial court's award of attorney's fees is not clearly against the facts and circumstances that were before it and is therefore not

an abuse of discretion.

Conclusion

The trial court's unequal division of marital property by awarding the entire Pension to Lori appears to be supported by evidence in the record, but the trial court failed to state its reasons for doing so. The trial court did not abuse its discretion by awarding partial attorney's fees to Lori based on Bruce's litigation conduct and other facts in the record. We therefore reverse and remand in part and affirm in part.

Reversed and remanded in part and affirmed in part.

MAY, J., and VAIDIK, J. concur.