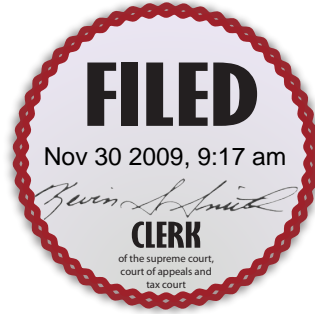


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

APRIL L. BOARD
April L. Board, P.C.
Valparaiso, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MELISA J. CHENOWETH,)
)
Appellant/Respondent,)
)
vs.) No. 64A03-0811-CV-565
)
MICHAEL D. CHENOWETH,)
)
Appellee/Petitioner.)

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
The Honorable James A. Johnson, Magistrate
Cause No. 64D01-0603-DR-1864

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Melisa J. Chenoweth (“Wife”) appeals a property distribution, child support, and joint custody order entered as part of the decree dissolving her marriage to Michael D. Chenoweth (“Husband”). We affirm in part, reverse in part, and remand.

Issues

We consolidate the issues as follows:

- I. Did the trial court abuse its discretion in dividing the marital estate according to the 50/50 presumptive split?
- II. Did the trial court err in calculating the reasonable value of daycare for the couple’s two minor children?
- III. Did the trial court abuse its discretion in failing to grant retroactive child support in consideration of the birth of the second child during the pendency of the dissolution proceedings?
- IV. Did the trial court abuse its discretion in awarding Husband and Wife joint legal custody of their two minor children?

Facts and Procedural History

In August 2001, Husband and Wife began cohabiting in a home Husband had purchased in March of that year. Wife contributed to Husband’s mortgage payments from August 2001 to June or July 2003, when she became pregnant with L.C., born February 16, 2004. The couple married on October 20, 2004. At that time, Wife’s 401(k) was worth approximately \$62,400.00.

On March 2, 2006, Husband filed a petition for dissolution of marriage. At that time, Wife was earning \$705.00 per week, and Husband was earning \$1,192.00 per week. On May 10, 2006, the parties entered an agreed provisional order pursuant to which Husband would

pay the full mortgage payment of \$685.31 per month “for and as child support” for L.C. Appellant’s App. at 16. On December 23, 2006, Wife gave birth to the couple’s second child, S.C. On January 12, 2007, she filed a petition to modify the support provisions of the order based on S.C.’s birth and her ensuing reduction in income due to maternity leave. The trial court did not rule on her modification petition.

Instead, on June 17, 2008, the trial court held a final hearing on Husband’s dissolution petition. At that time, Wife was unemployed and was pursuing a degree in nursing and pharmacy tech. On August 26, 2008, the trial court issued an order dissolving the marriage.

The order includes the following findings:

6. That the parties are the parents of two (2) children: L.C., age 4 and S.C., age 18 months. It is found to be in the children’s best interest that the parents share joint legal custody of them, as defined by statute. There has been no showing that the parties are unable to communicate meaningfully about the children

....

10. Pursuant to Exhibit A, which is attached hereto and incorporated by reference herein, [Husband] shall pay the sum of \$351.17 per week as child support. Minimum wage was imputed to [Wife] at this time. While she actually pays \$270.00 per week for work related child care, this sum is found to be excessive. While some form of child care may be necessary, it could be obtained for a more reasonable cost. Thus, a figure of \$150.00 per week has been used.

11. [Husband] shall maintain health care insurance on the children through his employment, as well as the supplemental insurance (AFLAC) currently in place. [Wife] shall pay the first \$1,000.00 of uninsured health care expenses for the children each calendar year (prorated for 2008). Health care expenses for the children in excess of \$1,000.00 per calendar year shall be apportioned 83% to [Husband] and 17% to [Wife]. As used herein, the term, “health care expenses” shall include hospital, medical, dental, optical, pharmaceutical, orthodontic and psychological expenses.

....

13. That [Wife] filed on January 12, 2007, a petition to modify the agreed provisional order due to the birth of [S.C.]. However, no hearing was ever held. Now Wife requests relief retroactive to the filing date.

Provisionally, [Husband] paid the house mortgage where Wife and children live in the amount of \$657.00 or \$152.79 per week. Husband, also, provided health insurance, bought diapers, formula, furniture for [S.C.], etc.. [sic] He also paid child support and will pay substantial uninsured health care expenses. The birth of [S.C.] did not make the provisional order unreasonable. [Wife's] motion is denied.

14. That during the provisional period, Wife had certain repairs at the home made by purchasing supplies at Benjamin Franklin without consulting Husband. One repair was to put in a missing tub spout; the other replaced a hot water heater. These debts are not marital debts nor were they incurred by agreement of the parties. Wife shall be solely responsible for these debts.

15. That the marital estate is found to consist of:

....		
Wife's Amerprise [sic] IRA etc. 3 accounts		9,670.00
Wife's Fidelity 401K		88,005.00
Husband's Lincoln Financial (Allstate) IRA		39,459.00
...		
Husband's PNC 401K		19,589.00
....		
	Total	<u>\$260,933.00</u>

16. No compelling reason is shown which would support deviation from an equal division of the marital estate.

17. Distribution of the marital estate shall be as follows:

A. TO HUSBAND

....		
9. Husband's PNC 401K		19,589.00
....		
16. Lincoln Financial (Allstate) IRA		39,459.00
....		
	TOTAL	<u>\$113,530.00</u>

B. TO WIFE

1. Marital residence at filing	\$123,000.00
Mortgage	(88,007.00)
....	
8. Amerprise [sic] IRA etc. 3 accounts	9,670.00
9. Fidelity 401K	88,005.00
....	
TOTAL	\$147,398.00

18. In order to equalize the foregoing distribution it is necessary that Wife pay the sum of \$16, 936.50. This sum is a money judgment in favor of Husband and against Wife. No interest shall accrue, nor execution commence for sixty (60) days.

....

20. Wife shall refinance and remove Husband’s name from the real estate mortgage within 120 days[.]

21. Wife has submitted Respondent’s Exhibit MM which purports to detail uninsured medical expenses which accrued provisionally. Apparently some have been paid and some remain unpaid. Pursuant to the provisional order, the parties were to equally divide the child(ren)’s uninsured health care expenses The provisional order shall govern Respondent’s Exhibit MM.

Id. at 5-11.

On September 22, 2008, Husband filed a motion to correct error. Wife filed a notice of appeal on November 17, 2008. On January 2, 2009, Husband filed a motion to dismiss Wife’s appeal. This Court denied the motion on January 28, 2009, and held this appeal in abeyance pending the trial court’s ruling on Husband’s motion to correct error. This Court directed the trial court clerk to file any orders with the clerk of this Court. According to the Clerk’s docket, no trial court orders were filed. On July 10, 2009, this Court resumed full jurisdiction over this appeal.

Discussion and Decision

I. 50/50 Division of Marital Estate

Wife contends that the trial court abused its discretion in dividing the marital estate according to the 50/50 statutory presumption. We review a challenge to the trial court's division of marital property for an abuse of discretion. *Granzow v. Granzow*, 855 N.E.2d 680, 682-83 (Ind. Ct. App. 2006). However, at the outset, we note that Husband has failed to file an appellee's brief. As a result, we will not undertake the burden of developing his arguments for him. *Strowmatt v. Rodriguez*, 897 N.E.2d 500, 502 (Ind. Ct. App. 2008). Instead, we apply a less stringent standard of review and will reverse the trial court only upon a showing of prima facie error. *Id.* In this context, we define prima facie error as error "at first sight, on first appearance, or on the face of it." *Id.* (citation and quotation marks omitted).

Indiana Code Section 31-15-7-5 states that the trial court "shall presume that an equal division of the marital property between the parties is just and reasonable." However, the presumption in favor of equal distribution may be rebutted by evidence of the following factors:

- (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.

Id. (emphases added).

All marital property goes into the marital pot for division, even if it was owned by one spouse prior to the marriage or purchased with funds that one spouse brought into the marriage. *Hill v. Hill*, 863 N.E.2d 456, 461 (Ind. Ct. App. 2007). While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. *Id.* at 460. To the extent the asset was acquired by one spouse before marriage, the trial court may set over to that spouse the pre-marriage value of the asset in question and then divide equally between the parties the value of appreciation of the asset that is attributable to the marital period. *O'Connell v. O'Connell*, 889 N.E.2d 1, 11 (Ind. Ct. App. 2008).

As support for a deviation from the presumptive 50/50 split, Wife cites the short duration of the marriage, the significant pre-marital value of her 401(k) account, and the relative earnings of the parties. Wife married Husband when she was thirty-seven years old. The marriage lasted approximately four years. Before the marriage, her 401(k) was worth approximately \$62,400.00. As of the date the marital property was valued, it was worth about \$88,000.00. Thus, the account increased in value by approximately \$25,600.00 during

the marriage.¹ Thus, this \$88,000.00 asset accounts for over one-third of the value of the entire marital estate, and only twenty-nine percent of its value is attributable to the four-year life of the marriage. Finally, as of the date of dissolution, Husband's weekly income of \$1,264.00 was nearly five times as much as the minimum wage imputed to Wife while she pursues the completion of her education. As such, Wife has presented a prima facie case that the trial court erred in applying the presumptive 50/50 split. As a result, the order that Wife pay Husband a \$16,936.50 equalization judgment is unwarranted. Thus, we conclude that Wife should receive approximately fifty-six percent of the marital property and Husband should receive approximately forty-four percent.² Accordingly, we reverse and remand for proceedings consistent with this decision.

II. Daycare Expenses

Wife also contends that the trial court erred in calculating the reasonable cost of daycare for the two children while she attended classes. The trial court deemed excessive the current \$270.00 per week Wife paid for daycare and imposed "a more reasonable cost" of \$150.00 per week. Appellant's App. at 6. When reviewing the trial court's findings of fact, we will consider whether the evidence supports the findings and whether the findings support the judgment. *Thomas v. Orlando*, 834 N.E.2d 1055, 1057 (Ind. Ct. App. 2005). Findings of fact will be set aside only if they are clearly erroneous, which occurs only when the record

¹ In her brief, Wife offers a figure of approximately \$24,000.00. However, the record indicates that the increase in value during the marriage was closer to \$25,600.00. Tr. at 38.

² Without the equalization judgment, Wife's assets were found to total \$147,398.00, and Husband's assets were found to total \$113,530.00.

contains no facts to support them either directly or by inference. *Id.* Clear error occurs when our review of the evidence leaves us with the firm conviction that a mistake has been made. *Id.* at 1057-58.

Indiana Child Support Guideline 3(E)(1) provides in part that

[c]hild care costs incurred due to employment or job search of both parent(s) should be added to the basic obligation. It includes the separate cost of a sitter, day care, or like care of a child or children while the parent works or actively seeks employment. *Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children.* Continuity of child care should be considered. Child care costs required for active job searches are allowable on the same basis as costs required in connection with employment.

(Emphasis added.)³

Wife contends that the evidence does not support the trial court's determination that her weekly daycare expense figure of \$270.00 is excessive. In her brief, she asserts that "[t]he only evidence of the cost of daycare adduced at trial for the two small children, was [her] testimony that she paid \$270.00 per week for said daycare." Appellant's Br. at 11. At the final hearing, Wife testified that the children were attending the YMCA's Always Learning program full-time at a cost of \$275.00 per week. Tr. at 93. She stated that, although her certification program required her to be in class for less than ten hours per week, the YMCA program required her to pay for full-time childcare regardless of the hours that the children actually attended. *Id.* at 94. She also indicated that she needed additional childcare hours to accommodate for study time, test preparation, and job interviews. *Id.*

³ Childcare expenses that are incurred because the parent with primary custody is a full-time student are considered work-related expenses as contemplated by the Guidelines. *Thomas*, 834 N.E.2d at 1059.

She further testified that her children's actual attendance varied from week to week and was generally four to five days a week from "roughly about 9:00 until 3, 3:30, some days 4:30." *Id.* at 93-94. Finally, Husband's counsel concluded her cross-examination on this issue by asking Wife the following:

Q. So, ma'am, do you realize with this child support guideline that you put in at [\$]275, you're asking your husband to pay 83 percent of that while you are taking a class of roughly nine hours a week, you're putting your children in day care for five days a week?

A. I'm asking him to help me, yes, I am.

Id. at 95. In sum, our review of the record indicates that the trial court acted within its discretion in finding that Wife's request for \$270 for work-related childcare was excessive and that childcare could be obtained for a more reasonable cost of \$150.00 per week.

III. Retroactive Child Support

Wife argues that the trial court abused its discretion in denying her petition to modify the agreed provisional order to require Husband to pay retroactive child support for S.C. during the twenty months between her birth and the date of final judgment. Decisions regarding child support rest within the sound discretion of the trial court and will be reversed only if there has been an abuse of discretion or if the trial court's determination is contrary to law. *Quinn v. Threlkel*, 858 N.E.2d 665, 674 (Ind. Ct. App. 2006). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Carter v. Dayhuff*, 829 N.E.2d 560, 569-70 (Ind. Ct. App. 2005).

Indiana Code Section 31-16-8-1(b) provides that a child support order may be modified only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

The petitioner bears the burden of proving a substantial change in circumstances. *Carter*, 829 N.E.2d at 570. Wife cites S.C.'s birth and her subsequent unemployment as substantial changes in circumstances making the provisional child support award unreasonable. Changes in employment and relative financial resources of the parties have been held sufficient to support a modification in child support. *Walters v. Walters*, 901 N.E.2d 508, 511 (Ind. Ct. App. 2009); *Burke v. Burke*, 809 N.E.2d 896, 898 (Ind. Ct. App. 2004); *Harris v. Harris*, 800 N.E.2d 930, 938 (Ind. Ct. App. 2003), *trans. denied* (2004).

At the final hearing, the trial court acknowledged that Wife's petition for modification had never been ruled on and concluded that S.C.'s birth did not make the provisional order unreasonable. The trial court cited Husband's payment of the mortgage as well as his payment of sums for health insurance, diapers, formula, and furniture for S.C. and his contribution toward her uninsured medical expenses. Appellant's App. at 7. The May 2006 agreed provisional order provides in part as follows:

3. *Wife shall continue to insure the parties' daughter on her health insurance. Any reasonable and necessary uninsured health care expenses shall be divided equally between the parties.*

....

7. Husband shall pay the following debts: *the house mortgage (for and as child support)*

Id. at 16 (emphases added).

Both the date and the language of the provisional order make it clear that it covers only the couple's first daughter, L.C. Husband's testimony at the final hearing clearly indicates that he did not pay support for his second child, S.C., during the interim between her December 2006 birth and the date of the final hearing:

[Wife's Counsel]: Is it true that since the birth of your second child, you've paid no additional support for that child?

[Husband]: That is correct.

[Wife's Counsel]: All right. So, for a year and-a-half, you've really been paying support on the basis of only one child; right?

[Husband]: Yes.

[Wife's Counsel]: And is it also true that even though [Wife] hasn't been employed for eight months, nonetheless, you're paying support at the previous rate based on her earned income before the layoff; right?

[Husband]: Yes.

[Wife's Counsel]: Would you be—would you think it would be fair to assume that had proper adjustments been made for those two substantial changes in circumstance, your support would have been a lot higher over the last year and-a-half?

[Husband]: Yes.

Id. at 31-32. Given Husband's admission at trial, we conclude that the trial court abused its discretion in denying Wife's petition for modification. We reverse and remand for further proceedings consistent with this decision.

IV. Joint Legal Custody

Finally, Wife contends that the trial court abused its discretion in awarding the parties joint legal custody of their two children. Child custody determinations are a matter left to the sound discretion of the trial court. *Gonzalez v. Gonzalez*, 893 N.E.2d 333, 335 (Ind. Ct. App. 2008). We are reluctant to reverse a trial court's grant of joint legal custody and will do so when the evidence indicates a clear abuse of discretion such that "the joint custody award constitutes an imposition of an intolerable situation upon two persons who have made child rearing a battleground." *Swadner v. Swadner*, 897 N.E.2d 966, 974 (Ind. Ct. App. 2008) (citation and quotation marks omitted). The trial court may award joint legal custody if it determines that such an award would be in the best interests of the child. Ind. Code § 31-17-2-13. In making such a determination, the trial court shall consider, among other factors, "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare." Ind. Code § 31-17-2-15(2). Joint legal custodians "may determine the child's upbringing, including the child's education, health care, and religious training." Ind. Code § 31-17-2-17(a)(2).

Here, the trial court found that it was "in the children's best interest that the parents share joint legal custody of them, as defined by statute. There has been no showing that the parties are unable to communicate meaningfully about the children." Appellant's App. at 5. Wife claims that joint legal custody is unwarranted based on Husband's alleged unwillingness to cooperate and communicate with her regarding the children's upbringing. She testified that he was unreasonable and "not interested in sitting down and discussing

anything related to the children: Their health care, their education, there's no discussion.” Tr. at 52. However, she went on to testify that there are no meaningful disparities in Husband's and her positions on education, health care, and religious upbringing. *Id.* at 54. According to Wife, the communication difficulties center on financial issues and Husband's alleged refusal to discuss items such as medical bills or expenses associated with certain activities. *Id.* at 53-54. She did state, however, that “anything you send to him directly he will pay.” *Id.* at 53.

Husband testified as follows regarding his desire for joint legal custody:

Q. Do you want to be actively involved in the three areas regarding education, medical, and religious decisions with your girls?

A. Most definitely.

....

Q. Would you tell the Court why you feel it's important that you be actively involved, an equal participant in making decisions—major decisions concerning the two girls in those three areas?

A. I believe that it's important for a father to be actively involved in every part of their life; and I want to be a part of their lives as they grow up because it's very important as they develop that they should have the support of both of the parents and not just one.

Q. So, you're asking that you have equal say-so with your wife; correct?

A. That is correct.

Q. And if there are problems that cannot be resolved between the two of you, would you then want to go to a mediator to try to resolve it before you return to court on a petition?

A. Yes.

Tr. at 5-6.

Husband's testimony indicates both his strong desire to be active in the girls' lives and his assent to submit to mediation in the event of future disagreements with Wife. It is not unusual for divorcing couples to have disagreements and arguments; however, the record is devoid of "evidence of fundamental differences in child rearing philosophies, religious beliefs, or lifestyles." *Walker v. Walker*, 539 N.E.2d 509, 513 (Ind. Ct. App. 1989). Thus, the evidence here does not indicate "that child rearing became a battleground." *Id.* As such, the trial court acted within its discretion in awarding Husband and Wife joint legal custody.

Conclusion

In sum, we conclude that the short duration of the marriage, the pre-marital value of Wife's 401(k) account, and the relative earnings of the parties justify a deviation from the 50/50 presumptive split of the marital estate and remand for division of the marital estate in accordance with this decision. Because of our holding on this issue, we need not address other issues involving the division of marital property. These include the division of uninsured medical expenses, the disposition of the marital residence, and the trial court's order that Wife refinance the marital residence to satisfy the equalization judgment.⁴ Instead, the trial court shall address these issues on remand in accordance with this decision. Further,

⁴ With regard to issues surrounding the disposition of the marital residence, we note that neither party wants to live in the residence long-term, but that Wife wants to live there until S.C.'s fifth birthday so that the children may have a stable living environment during their formative years. Both parties agree that the residence is not in a sellable condition. As such, it is questionable whether it would appraise at such a value as to qualify for a refinance. Moreover, Wife possesses neither the skills necessary to make the needed improvements herself nor the regular income to hire out such services. On remand, the trial court must determine the best course of action to preserve the value of this asset, in accordance with this decision.

on remand, the trial court shall determine a retroactive support award. In all other respects, we affirm.

Affirmed in part, reversed in part, and remanded.

MAY, J., and BROWN, J., concur.