ATTORNEY FOR APPELLANT:

JOHN QUIRK
Muncie, Indiana

ATTORNEY FOR APPELLEE

RALPH E. DOWLING
Muncie, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DENNIS WALBURN,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 18A02-0706-CV-465
	)	
SYNDA K. WALBURN,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0506-DR-12

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Dennis Walburn ("Husband") appeals the trial court's disposition of property in his dissolution proceedings with Synda K. Walburn ("Wife"). Specifically, Husband argues that the trial court abused its discretion by including two sums of money—$13,678.00 and $21,533.00—in the marital pot. Finding that the trial court acted within its discretion by including these assets in the marital pot, we affirm.

Facts and Procedural History

Husband and Wife were married in June 1965 and had two children. After separating in July 2001, the parties maintained separate households. Wife filed a Petition for Dissolution of Marriage on June 14, 2005.

While married, Husband and Wife owned a pool business. After separating, Wife continued working at the pool business until 2004, and Husband worked at the business until it closed in 2005.

A final hearing on the dissolution petition was held on March 5, 2007,[1] following which the trial court issued an order, which provides, in pertinent part:

[1] The docket reflects numerous filings, hearings, and orders between the date the dissolution petition was filed and the date of the final hearing; however, these events are not relevant to the issues before us on appeal. Therefore, the Facts and Procedural History section of this opinion is abbreviated. For ease of comprehension, we do note that four months after the dissolution petition was filed, the trial court entered an order providing, in pertinent part:

> 1. That any income received by the Respondent, through his business, or through the sale of inventory shall be first used to pay the house payment on the home the Respondent is currently residing in and the rest is to be split between the parties for living expenses.
> 2. The Court further orders that both homes, all real estate, and all personal property be sold at auction with an auctioneer to be agree[d] upon by the parties.

Appellant's App. p. 53.

Petitioner is confirmed in her possession of a 1992 Chevy Suburban, two (2) parcels of real estate at the value of $2,500.00 each across from the dwelling she purchased at the auction of the Parties' realty, and the cash value of her life insurance ($7,000.00), and Respondent is confirmed in possession of a 1994 Chevy Suburban, *$21,533.00 in funds withdrawn from First Merchants Bank, $13,678.00 proceeds of business sales*, a Grandfather Clock valued at $500.00, a rototiller valued at $50.00, a utility sink valued at $15.00, two (2) cemetery plots valued at $4,000.00, and 2004 tax refund of $1,300.00. Division of the remainder of the marital property is taken under advisement.

The Court, having reviewed the record and evidence herein and being advised, now finds the final distribution of the Parties' remaining personalty should be as follows, to wit:

1. The Parties shall equally bear the costs of Cannon Appraisers ($550.00) and their pool business tax ($66.00), all of which shall be deducted from the trust account;

2. The Parties' attorney fees incurred subsequent to auction of marital realty and personalty shall be borne by each Party individually.

3. Respondent shall reimburse Petitioner one-half 2004 tax refund ($650.00), one-half value of Grandfather Clock ($250.00), one-half value of rototiller ($25.00), and one-half value of utility sink ($7.50), one-half value of two cemetery plots ($2,000.00), *one-half of the receipts of the Parties' pool business ($6,839.00)*, the full cost of tax liens ($2,535.22), First Merchants' attorney fees ($532.50), Petitioner's payment to avoid foreclosure on 701 N. Biltmore Avenue property ($3,170.52), Petitioner's payment of Spring and Fall taxes 2005 due 2006 on parcels 111142700400, 1111426015000, and 111142700500 (total: $1,731.16), Petitioner's automobile collision cost ($887.62), and *Petitioner's one-half share of proceeds Respondent withdrew from First Merchants Bank ($10,766,27)*; this shall be paid from the trust account.

4. Petitioner shall reimburse Respondent one-half the value of the two (2) vacant parcels ($2,500.00) and one-half the value of Petitioner's life insurance ($3,500.00); this shall be paid from the trust account.

5. The remaining balance in the trust account shall be divided equally between the Parties.

Wherefore it is hereby ordered, adjudged and decreed by the Court that the marital assets be divided in accord with the findings herein.

Appellant's App. p. 114-15 (emphases added). On April 9, 2007, Husband filed a Motion to Correct Errors alleging that the trial court erred by including the $13,678.00 in business proceeds and the $21,533.00 withdrawn from First Merchants Bank in the

marital pot. Following a hearing, the trial court denied the motion on May 2, 2007. Husband now appeals.

Discussion and Decision

On appeal, Husband contends that the trial court erred by including the $13,678.00 in business proceeds and the $21,533.00 withdrawn from First Merchants Bank in the marital pot. When disposing of the marital property in this case, the trial court issued findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A).[2] When a trial court issues such findings, we apply a two-tiered standard of review. *Granzow v. Granzow*, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006). We first determine whether the record supports the findings and, second, whether the findings support the judgment. *Id.* The judgment will only be reversed when clearly erroneous, *i.e.*, when the judgment is unsupported by the findings of fact and the conclusions entered upon the findings. *Id.* Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. *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, and we will not reweigh the evidence or assess witness credibility. *Id.*

First, Husband contends that the trial court erred by including the $13,678.00 in business proceeds in the marital pot because it was "earned after the separation of the parties in 2001 but prior to the filing of the dissolution in 2005." Appellant's Br. p. 7. As such, he argues that when identifying the marital property to be divided, "[t]he trial

[2] Neither party sets forth the standard of review for when a trial court issues findings, and neither party indicates whether the trial court here issued findings *sua sponte* or by request. Regardless of which standard applies, the result would be the same in this case.

court should have used the date of separation of June of 2001, or the date the wife no longer worked in the pool business in 2004." *Id.* at 9.

It is well-established that all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, *acquired by either spouse after the marriage and before final separation of the parties*, or acquired by their joint efforts. Ind. Code § 31-15-7-4(a); *Beard v. Beard*, 758 N.E.2d 1019, 1025 (Ind. Ct. App. 2001), *trans. denied*. With two exceptions not applicable here, "final separation" means "the date of filing of the petition for dissolution of marriage." Ind. Code § 31-9-2-46. This "one-pot" theory ensures that all assets are subject to the trial court's power to divide and award. *Thompson v. Thompson*, 811 N.E.2d 888, 914 (Ind. Ct. App. 2004), *reh'g denied*, *trans. denied*. 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.*

Contrary to Husband's argument on appeal that the trial court should have used the date of the parties' separation in 2001 when identifying the marital property to be divided,[3] case law is clear that "the 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." *Granzow*, 855 N.E.2d at 684. Wife filed the petition for dissolution of marriage on June 14, 2005. According to Husband, the $13,678.00 was

[3] Citing *Hunter v. Hunter*, Husband argues that the trial court is not bound to use the date the dissolution petition was filed. 498 N.E.2d 1278, 1295 (Ind. Ct. App. 1986). Husband is wrong to rely on *Hunter* for this proposition. In *Hunter*, this Court stated that the trial court can use the date the parties no longer resided together as a factor in making a just and reasonable *division* of property. *Id.* The *Hunter* court did *not* say that this is a factor in determining what assets should be included in the marital pot. Notably, Husband makes no argument on appeal regarding the trial court's division of the marital property.

"earned from a two month period just prior to the filing of the dissolution." Appellant's Br. p. 9. Because the money was earned before the date the petition for dissolution was filed, the trial court did not abuse its discretion by including it in the marital pot.

Next, Husband contends that the trial court erred by including the $21,533.00 withdrawn from First Merchants Bank in the marital pot because "it was used to pay marital debt [from] which each party then received [a] benefit."[4] *Id*. at 10. It is true that money used to satisfy marital debts before dissolution is not marital property subject to division. *Gard v. Gard*, 825 N.E.2d 907, 910-11 (Ind. Ct. App. 2005); *Hitchcox v. Hitchcox*, 693 N.E.2d 629, 631 (Ind. Ct. App. 1998). Husband's lone citation to the record to support his assertion that the $21,533.00 was used to pay marital debts is to page fifty-eight of the transcript. There, Husband testified that the money was used for "[b]usiness" and "business supplies, medical, and utilities." Tr. p. 58. When asked if he used *all* of the money for business, Husband replied that he "may" have used some for "personal, utilities." *Id.* Importantly, Husband did not introduce any documentation to support his assertion that all of the money was used to reduce marital debts. By including the $21,533.00 in the marital pot, the trial court necessarily found that it was not used to satisfy marital debts before dissolution.[5] In so doing, the trial court apparently did not

[4] Husband also appears to argue that the trial court erred by including the $13,678.00 in the marital pot because it, too, was used to reduce marital debts. However, Husband makes no analysis on this point. Instead, Husband focuses on the $21,533.00 and claims that this amount was used to reduce marital debts. As for the $13,678.00, Husband just reiterates his first argument that the trial court erred by including this amount in the marital pot because it was earned after separation of the parties. *See* Appellant's Br. p. 11. In any event, Husband does not point to any evidence in the record showing that the $13,678.00 was used to reduce marital debts.

[5] In fact, Wife's attorney argued during closing argument that because there was no documentation to support Husband's testimony that the money was used to satisfy marital debts, the money should be considered marital property. *See* Tr. p. 76-77.

credit Husband's testimony that the money was used to satisfy marital debts, and we do not assess witness credibility on appeal. Accordingly, the trial court did not abuse its discretion by including this amount in the marital pot.[6]

Affirmed.

SHARPNACK, J., and BARNES, J., concur.

[6] In the last sentence of the Brief of Appellee, Wife requests appellate attorney fees pursuant to Indiana Appellate Rule 66(E) on grounds that the appeal is "frivolous." Wife does not set forth a standard or analysis of this issue, and, therefore, we find it waived. *See* Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, although Husband's brief and arguments are deficient in some respects, his appeal is not "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *See Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). Therefore, we decline Wife's request for appellate attorney fees.