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IN THE COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
	)	
DONALD K. AZZARITO,	)	
	)	
Appellant-Petitioner,	)	
	)	
and	)	No. 20A03-0603-CV-125
	)	
AMY S. AZZARITO,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D03-0605-DR-51 (formerly 20D06-0308-DR-469)

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The marriage of Appellant-Petitioner Donald K. Azzarito ("Donald") and Appellee-Respondent Amy S. Azzarito ("Amy") was dissolved on February 16, 2006. Donald now appeals the child support order and division of marital property. We affirm in part, reverse in part, and remand.

Issues

Donald presents eight issues for review, which we consolidate and restate as:

I. Whether the trial court erred in ordering that all future child support modifications be effective on the first Friday after April 15th of each year regardless of when the petition was filed;

II. Whether the trial court erred in ordering Donald to report to Amy when his income increases and submit a Child Support Worksheet to the Court, regardless of whether a year has passed and the difference in child support would be greater than twenty percent;

III. Whether the trial court erred in its distribution of the marital property;

IV. Whether the trial court erred in awarding rehabilitative maintenance.

Facts and Procedural History

Donald and Amy were married on August 22, 1992. They had two children, ages eleven and eight at the time of the final dissolution hearing. Both children have celiac sprue, a condition that requires a gluten-free diet, in addition to other health conditions.

Donald filed for dissolution of the marriage on August 20, 2003. Amy and Donald stipulated that they would share joint legal custody and Amy would have physical custody of their two children. After a hearing on October 21, 2005, the trial court granted the petition for dissolution and entered its order on February 16, 2006. Donald now appeals. Additional

facts will be provided as necessary.

Discussion and Decision

At Donald's request, the trial court entered findings of fact and conclusions of law. Findings of fact are reviewed under a clearly erroneous standard. Ind. Trial Rule 52(A). Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. Miller v. Sugden, 849 N.E.2d 758, 760 (Ind. Ct. App. 2006), reh'g denied. This analysis requires the application of a two-tiered standard: first, whether the evidence supports the findings and second, whether the findings support the judgment. Id. We do not weigh the evidence or judge the credibility of the witnesses but, rather, consider only that evidence most favorable to the judgment, together with the reasonable inferences that can be drawn therefrom. Id. However, conclusions of law are reviewed de novo. Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002).

I. Future Child Support Modification Effective Date

Donald first challenges the portion of the order that any future child support modification is to be effective on the first Friday after April 15th arguing that this would allow a modification of the child support order to be applicable on a date prior to the filing of a petition for modification. Decisions regarding child support are generally within the sound discretion of the trial court. Naggatz v. Beckwith, 809 N.E.2d 899, 901 (Ind. Ct. App. 2004), trans. denied. We will reverse only for an abuse of discretion or if the trial court's determination is contrary to law. Beehler v. Beehler, 693 N.E.2d 638, 640 (Ind. Ct. App. 1998).

The challenged portion of the child support order provides:

> Further, the Parties are Ordered to exchange income tax returns annually on or before April 15th each year including supporting information such as W-2 Forms. If there is a change in Child Support, it will be effective the first Friday after April 15th of each year regardless of when filed, unless the parties agree otherwise.

Appellant's Appendix at 16. Donald does not challenge the requirement to exchange information. Instead he only challenges the last sentence as to the effective date of any modification.

All modifications to a child support order must operate prospectively. Id. "[R]etroactive modification of support is erroneous only if the modification purports to relate back to a date earlier than that of the petition to modify." Carter v. Dayhuff, 829 N.E.2d 560, 567 (Ind. Ct. App. 2005).

Strict adherence to the "effective the first Friday after April 15th" clause is contrary to caselaw in that it would permit a child support modification that relates back to a date earlier than that of the petition to modify. Thus, we reverse, because the last sentence of this portion of the order would allow an improper retroactive modification of child support, and it should be vacated.

II. Future Child Support Modification Qualifications

Next, Donald contends that a portion of the order allows a modification of child support without regard to the one-year and twenty percent difference statutory requirement. Again, we will reverse only for an abuse of discretion or if the trial court's determination is contrary to law. Beehler, 693 N.E.2d at 640.

The pertinent portion of the order states as follows:

> The father's income for 2003 was $55,130 resulting in a weekly income of $1,060.19, as determined by Husband's Exhibit P. The Court further finds that the father has not had a raise in pay with his employer, The Center PC, at his request. The father has been employed for eight years and he has had increased compensation each year he has worked there until he filed for Divorce. He has asked to not be reviewed since the initiation of this case and the parties [sic] separation.
>
> The Court now Orders that upon the father being evaluated and/or receiving any type of increase in his income, as income is defined in the Indiana Child Support Guidelines, he is ordered to advise the mother within fourteen (14) days and a Child Support Worksheet shall be prepared and submitted to the Court for approval, regardless if there has been a one year and a twenty percent (20%) difference in the child support.

App. at 16.

According to Indiana Code Section 31-16-8-1, a modification of child support may be made 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 set.

A close reading of the excerpt from the order reveals that it only requires the reporting of an increase of income and completion and submission of a Child Support Worksheet regardless of the passing of time or amount of the increase. The order, however, does not state that upon submission of the new Child Support Worksheet the trial court will automatically grant an increase in child support. Therefore, the child support order does not violate the statutory requirements for modification.

The trial court's findings included that Donald asked his employer to postpone performing his annual review. Donald contends that the evidence does not support this finding that he "has asked to not be reviewed since the initiation of this case". Contrary to this assertion, Donald points out that he and his employer testified that Donald asked not to be evaluated until after the divorce proceedings, because Donald was concerned about receiving a negative evaluation. The reason why Donald made this request is not relevant. When the trial court entered its order, Donald had not received a review or change in his income for almost four years. Upon his next review, Donald's income will most likely increase, possibly significantly, due to the considerable lapse of time since his last evaluation. Based on the suspension of Donald's review until the dissolution proceedings were completed, it was within the trial court's broad discretion to require Donald to inform Amy of any increases in his income and then report the same to the trial court to determine whether a modification in child support would be warranted.

III. Distribution of Marital Property

Donald challenges the distribution of the marital property in that the order: (A) requires Donald and Amy to equally split all future tax refunds; (B) includes in the marital estate money no that longer exists that is attributed to a cashed-out life insurance policy and gifts received by Amy during the marriage; and (C) divides the marital property with a significant deviation from the presumptive equal division.

The distribution of marital property is within the sound discretion of the trial court. Nowels v. Nowels, 836 N.E.2d 481, 484 (Ind. Ct. App. 2005). We will reverse only for an abuse of discretion. Shannon v. Shannon, 847 N.E.2d 203, 205 (Ind. Ct. App. 2006). An

abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Elkins v. Elkins, 763 N.E.2d 482, 484 (Ind. Ct. App. 2002). An abuse of discretion also occurs when the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. Id. In our review, we only consider the evidence most favorable to the trial court's disposition of marital property and will not reweigh the evidence or assess the credibility of witnesses. Shannon, 847 N.E.2d at 205.

A. Equal Division of Future Tax Refunds

First, Donald challenges the order requiring the equal division of the ex-spouse's future tax refunds because it essentially divides the parties' future income. The relevant portion of the order states:

> FUTURE TAX RETURNS:
>
> The calculation of income taxes for future years will allow the father to claim the two children as deductions only while they benefit the parties as above demonstrated, that being, as long as the mother may claim the earned income credit to the level that makes this arrangement a benefit to the parties by maximizing their refunds. The parties to split the total refund equally.

App. at 20.

A trial court may not divide the future earnings of a party in anticipation that they will be earned. Nowels, 836 N.E.2d at 484. In a dissolution proceeding, the trial court is required to divide the assets and liabilities of the parties in which they have a vested present interest. In re Marriage of Lay, 512 N.E.2d 1120, 1123-24 (Ind. Ct. App. 1987). Accordingly, a trial court may not divide assets that do not exist just as it may not divide liabilities that do not

exist. Id.

Donald and Amy do not have a vested present interest in their future tax refunds, because the refunds did not exist at the time of the dissolution decree. Therefore, we conclude that it was an abuse of discretion to require the parties to equally split their future tax returns. Accordingly, we reverse that portion of the order requiring the division of future refunds, and on remand direct the trial court to vacate this provision of the decree.

B. Cashed-Out Life Insurance Policy and Inclusion of Gifts

Second, Donald challenges the inclusion of depleted funds from a cashed-out life insurance policy and gifts received by Amy from her family during their marriage. As noted in Section A, the trial court is required to divide the assets and liabilities of the parties in which they have a vested present interest. In re Marriage of Lay, 512 N.E.2d at 1123-24. Thus, the inclusion of the life insurance monies and monetary gifts hinges on whether Amy and Donald had a vested present interest in them at the time of the dissolution.

Nine days prior to filing the Petition for Dissolution of Marriage, Donald cashed-out his Lincoln Financial Group life insurance policy and applied its entire value of $1,840 to the balance for furniture that the couple had purchased in the past year. Donald did this without Amy's knowledge. Additionally, Donald does not dispute that he is currently in possession of this furniture.

Donald contends that the trial court erred by including the $1,840 as one of his assets, because the money has been spent and he no longer has a vested present interest in the money he received. Although labeled 'Insurance cash in' on Exhibit A of the dissolution order, the order notes that Donald possesses the unencumbered furniture. Thus, the order is not

allocating the money from the life insurance policy, but the property, in which Donald has a present vested interest, acquired with the money. However, this furniture, along with other personal property, had already been divided subject to the stipulation of Amy and Donald and these items were not to be included in the trial court's distribution of the marital property. Therefore, it was an abuse of discretion to include the value of the furniture in the property distributed by the trial court, because the order included property that had already been taken into account.

The marital property division also allotted Amy a credit of $11,500, representing one half of the monetary gifts she received from her family during the marriage. Over several years, Amy received $23,470 in gifts from her family that she deposited in the couple's joint account and used to pay debts that arose during the marriage and make purchases to benefit the family. Thus, this money has been depleted and was not used to acquire particular property to be possessed only by Amy. Indiana Code Section 31-15-7-5(2)(B) does allow the presumption for an equal division of the marital property to be rebutted if a spouse through an inheritance or gift acquired marital property. However, money used to satisfy marital debts prior to dissolution is not marital property subject to division. Hitchcox v. Hitchcox, 693 N.E.2d 629, 631 (Ind. Ct. App. 1998). All of this money has been spent and therefore, neither Amy nor Donald had a vested present interest in the gifts at the time of the dissolution. Accordingly, we conclude that it was an abuse of discretion to give Amy a credit for money that was used to satisfy marital debts and make general purchases for the family prior to the dissolution.

C. Division of Marital Property

When marital property is divided, both assets and liabilities must be considered. Miller v. Miller, 763 N.E.2d 1009, 1012 (Ind. Ct. App. 2002). Because it will likely upset the division of property equation, the adjustment of one asset or liability may require the adjustment of another to avoid an inequitable result or may require the reconsideration of the entire division of property. In sum, we remand with instructions for a redetermination of the division of marital property. On remand, the depleted gifts received by Amy from her family and the $1,840 received from cashing the life insurance policy that was applied to the balance of furniture in Donald's possession should not be included in the marital estate.

IV. Rehabilitative Maintenance

Finally, Donald argues that the trial court erred by awarding Amy rehabilitative maintenance in the amount of half of her student loans she borrowed to obtain her teaching degree because the statutory requirements for rehabilitative maintenance were not met and these loans were after-acquired debt.

After dividing the marital estate, the trial court gave Amy a credit in the amount of $9,000 as rehabilitative maintenance, which is half the amount Amy borrowed in student loans to obtain her special education teaching degree. Amy started the work for her teaching degree in October of 2004, almost a year after Donald filed the petition for dissolution.

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

> (3) 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.

We presume that the trial court considered these statutory factors before reaching its decision to grant or deny maintenance. Lloyd v. Lloyd, 755 N.E.2d 1165, 1171 (Ind. Ct. App. 2001). We review an award of maintenance under the abuse of discretion standard. Id.

The findings of the trial court addressing these factors included the following:

> The Husband at the time of the marriage had one year of college and $9,000 in debts.
> He continued his education while they were married and he attained his Bachelors Degree in 1997.
> The father has taken graduate level courses for the sole reason to remain qualified to sit for the CPA exam. He has taken that exam three times and he has not passed. The cost of the test is $400.00 each time.
> The Wife received a Bachelors Degree from Purdue University which she attained in 3 ½ years before they were married.
> She was employed when they were married at Red Roof Inn.
> She was an Assistant Manager in Ft Wayne, then promoted to General Manager in Elkhart.
> She made more money than he did when they were first married, he would then receive a raise and he would be ahead of her, then she would receive a raise and she would be ahead of him for a period of time. Their incomes were similar until 2002.
> Her job was eliminated, but she was offered another position with Red Roof Inn, she left employment with Red Roof Inn in December 2000.
> She received a $39,000 severance package when she left Red Roof Inn which was her income in 2001. She used it to pay off all of their debts. They were debt free.
> The mother, since she left her employment with Red Roof Inn, has devoted herself to the proper care, supervision, education and nurturance of the

> children.
> She is employed as a teacher and is in the process of attaining an education degree.
> The Wife is expending $18,000 in educational expenses to attain her teaching degree.
> The mother has embarked on a new career as a teacher because it is more conducive to being a parent, that is, her job at Red Roof Inn, was demanding and she was on call 24/7 and she was required to travel. The new job allows her more time with the children and allows her to have the same vacation times as the children.

App. at 24-26.

Because Donald requested the trial court to enter findings of fact and conclusions of law, we must determine whether the evidence supports the findings and whether the findings support the judgment. Applying the findings to the statutory factors, the findings do not support the judgment that rehabilitative maintenance is necessary. When the marriage was dissolved, both Amy and Donald had bachelor's degrees. From the time Amy left Red Roof Inn at the end of 2000 to the time Donald filed the dissolution petition in 2003, Amy only had an interruption from employment for two years. While employed, Amy's salary was comparable to Donald's salary. Additionally, the trial court did not make a finding that Amy's bachelor's degree was obsolete or that comparable jobs were not available in the area where Amy lives. Thus, we conclude the findings do not support the judgment that rehabilitative maintenance for Amy to obtain her teaching degree is necessary. Accordingly, we reverse Amy's credit for half of her student loans as an improper award of rehabilitative maintenance.

Conclusion

As to the child support provisions, it was within the trial court's discretion to require

Donald to report to Amy and the trial court any changes in his income. However, it was an abuse of discretion to permit future child support modifications to be retroactive to a date prior to the filing of a petition to modify. As to the division of the marital property, we conclude it was an abuse of discretion to require future tax refunds to be split equally. Furthermore, it was an abuse of discretion to include previously divided property and depleted assets in the marital estate. Finally, as to the award of rehabilitative maintenance, we conclude that the findings do not support the judgment. Accordingly, we affirm in part, reverse in part, and remand. On remand, the portion of the child support order allowing an improper retroactive modification and the award of rehabilitative maintenance is to be vacated. Also, a redetermination of the division of the marital estate should be performed in light our conclusion that the $1,840 value of the cashed life insurance policy and the depleted family gifts received by Amy during the marriage should not be included in the marital estate.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and MAY, J., concur.