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IN THE
COURT OF APPEALS OF INDIANA

L.C.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 23A05-1002-DR-200
	)	
R.C.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23C01-0905-DR-155

February 1, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, L.C. (Father), appeals the trial court's dissolution order distributing the parties' property, awarding primary physical custody of the parties' two daughters to Appellee-Petitioner, R.C. (Mother), and granting Mother's motion to relocate.

We affirm.

ISSUES

Father raises two issues on appeal, which we restate as the following three issues:

(1) Whether the trial court erred in distributing the parties' property;

(2) Whether the trial court erred in awarding primary physical custody of the parties' minor children to Mother; and

(3) Whether the trial court erred in granting Mother's motion to relocate.

FACTS AND PROCEDURAL HISTORY

Mother and Father were married on July 2, 1994. The couple lived in Florida for one year and then moved to Tempe, Arizona, where Mother had previously lived for twenty-one years. Their oldest daughter, I.C., was born in February 1999. In 2000, Mother, Father, and I.C. moved to Indiana where Father's parents lived. The parties' youngest daughter, G.C., was born in October 2004.

On May 7, 2009, Mother filed a petition for dissolution. On May 20, 2009, Mother filed a Verified Petition for Temporary Emergency Custody and Emergency Restraining Order wherein she alleged that on May 17, 2009, Father ripped a shelf off of the wall at the marital residence and told Mother that the residence belonged to him and that she could not

stop him from coming and going as he pleased. Mother fled to a nearby house owned by her parents. Father followed her to the residence and threw a lawn mower and a fertilizer spreader out of a shed while shouting that he was not going to be a "nice guy" anymore. (Appellee's App. p. 9). The petition further alleged that in April 2009, shortly before Mother filed the dissolution petition, Father grabbed and pushed Mother, locked himself in the bathroom, and threatened to commit suicide while the children were in the residence. A few days later, Mother received a phone call from a physician who told her that Father had been to his office in an agitated state and had threatened to commit suicide. The physician told Mother that he was professionally required to contact the police to report Father's threat.

On June 16, 2009, a provisional agreement granted the parties joint legal custody of their daughters, with Mother having primary physical custody. The agreement included that Father was seeking counseling and would follow all of the counselor's recommendations and take all prescribed medications. Father also agreed to execute consents to provide Mother's counsel with the counselor's progress reports. The agreement further enjoined Mother and Father from harassing or committing assault or battery upon the other.

On July 13, 2009, Mother filed an Affidavit for Contempt alleging that Father violated the provisional agreement on July 9, 2009, when he went to the home owned by Mother's parents where Mother and the children were living, and grabbed Mother by both arms while they were standing on the front porch, kissed her, and attempted to force himself into the house. When Mother threatened to call the police, Father said he would check himself into a mental hospital to stall the dissolution hearing and would declare bankruptcy.

On August 19, 2009, Mother filed a Notice of Intent to Relocate pursuant to Indiana Code section 31-17-2.2 wherein she explained that she planned to move her principal residence to Tempe, Arizona because 1) health related issues required a more favorable climate; 2) job opportunities were available to support her family now that she was a single mother; and 3) her parents lived in Tempe and would lend support to her children and family. On August 31, 2009, Father filed an Objection to Move and Petition for Custody wherein he asked the trial court to award him physical custody of both his daughters. That same day, the trial court entered an order enjoining Mother from moving the children to Arizona pending a hearing.

On October 19 and November 13, 2009, the trial court held hearings on the dissolution petition. Testimony at the hearing revealed that Mother has suffered from rheumatoid arthritis since she was two years old. When Mother became confined to a wheelchair at age six, she and her family moved from Chicago to Tucson, Arizona, based upon the recommendation of her rheumatologist. Within a matter of weeks, Mother was up and walking around. In recent years while living in Indiana, Mother has suffered from worsening pain, stiffness, and fatigue. Based on her past experience, Mother believes the warm Arizona weather will have a significant positive effect on her health. Mother also believes that she has more job opportunities in Arizona than in Indiana, and will make a higher salary there. Mother is a licensed clinical social worker with a specialty in geriatrics. She testified that as a geriatrics specialist, "there are actually a lot more people in Arizona to work with." (Appellee's App. p. 37). Further, at the time of the dissolution hearing, Mother did not make

enough money to pay her bills. The salary range for a licensed clinical social worker in Arizona is $45,000 to $65,000, which would allow her to support her family.

In addition, Mother's parents and siblings live in Tempe and will provide financial and emotional support to Mother and her two daughters after the move. Mother and both girls plan to live with Grandparents in their four-bedroom house that is a block away from the school the girls will attend. The school is a comparable size to the school that the girls currently attend and has won national recognition for academic excellence. Grandparents will also provide after-school care for the girls. Grandparents have always maintained a close relationship with both girls. They speak to the girls at least one time per week by phone, and maintain a residence in Indiana so that they have a place to stay when they visit the girls several times each year. In addition, Grandparents have helped the parties financially in the past. For example, Grandparents helped pay for the remodeling of the parties' Indiana home and also helped Mother purchase a new car because the car she received in the separation agreement had 220,000 miles on it.

The testimony at the hearing further revealed that Mother is the primary caretaker of both girls and provides their "structure, stability, and routine." (Transcript p. 39). Both girls are outgoing, friendly, adjust well to new situations, and make friends easily. Mother believes the girls will do well living in Arizona and has no concerns about their adjustment to the new home and school. Grandparents have offered to assist Father with his travel expenses to Arizona when he visits his daughters.

The testimony also revealed that Father is a binge drinker who "drinks excessive amounts at one time." (Tr. p. 34). He also smokes marijuana at home. In January 2009, Mother found marijuana hidden in the kitchen cabinet while she was serving dinner to the girls. Father has frequently failed to take the Friday to Sunday extended weekend visitation with the girls. For the two months prior to the hearing, Mother had both girls Friday night and all day on Saturday during Father's visitation weekends. In addition, in the past, Father has left the girls with friends or neighbors during his visitation. He also frequently goes on overnight trips to attend rock concerts.

Father testified that he currently takes medication for depression and attends counseling. However, he failed to execute the consents as set forth in the provisional agreement. Father's father is deceased, and his eighty-six-year-old mother lives nearby. Father asked the trial court to set aside to him a Putnam IRA valued at approximately $21,000.00, and a Merrill Lynch stock account valued at approximately $24,000.00, both of which he earned while employed at Pepsico Foods from 1989 to 1994.

On December 17, 2009, the trial court issued an order dissolving the parties' marriage, distributing the parties' property, awarding primary physical custody of the parties' children to Mother, and granting Mother's motion to relocate. The trial court equally divided the parties' property, including the Putnam IRA and the Merrill Lynch account.

Father appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

At the outset, we note our preference for granting latitude and deference to trial court judges in family law matters. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). The Indiana supreme court explained the reason for this deference in *Kirk*:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). Therefore, on appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal. *Id.* We now turn to the issues in this case.

Father argues that the trial court erred in distributing the parties' property, awarding custody of their children to Mother, and granting Mother's motion to relocate. We address each of his contentions in turn.

I. *Property Distribution*

Father first argues that the trial court erred in distributing the parties' property. Specifically, he contends the trial court erred in equally dividing the Putnam IRA and the Merrill Lynch accounts.

By statute, the trial court must divide the property of the parties in a just and reasonable manner, including property 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). An equal division of marital property is presumed to be just and reasonable. I.C. § 31-15-7-5. 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).

We apply a strict standard of review to a trial court's division of property. *Hill v. Bolinger*, 881 N.E.2d 92, 94 (Ind. Ct. App. 2008), *trans. denied*. The division of marital assets is a matter within the sound discretion of the trial court. *Id.* An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *Nornes v. Nornes*, 884 N.E.2d 886, 888 (Ind. Ct. App. 2008). When we review a challenge to the trial court's division of marital property, we may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of marital property. *Id.*

The party challenging the trial court's property division bears the burden of proof. *Hill*, 881 N.E.2d at 94. The presumption that the trial court correctly followed the law and made all the proper considerations when dividing the property is one of the strongest

presumptions applicable to our considerations on appeal. *Id.* Thus, we will reverse a property division only if there is no rational basis for the award. *Id.*

Here, the trial court equally divided the funds in the Putnam IRA and Merrill Lynch accounts. The court explained this equal division as follows: "[A]lthough husband testified that certain retirement monies were his prior to the marriage, this has been a long term marriage and husband failed to introduce any evidence as to valuations at the time of marriage and all retirement accounts are included for division of asset purposes." (Appellant's App. p. 11).

Our review of the evidence reveals that Father earned the funds in the Putnam IRA and Merrill Lynch accounts during his employment with Pepsico from 1989 to 1994, both before and during the marriage. In addition, both accounts accrued in value during the course of the fifteen-year marriage. However, the trial court correctly pointed out that Father failed to introduce any evidence as to the valuations of the accounts at the time of the marriage. The trial court also correctly pointed out that this was a long-term marriage. Under these circumstances, we conclude that the trial court did not err in equally dividing these accounts.

II. *Child Custody*

Father next argues that the trial court erred in awarding primary physical custody of the two minor children to Mother. Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion. *Klotz v. Klotz*, 747 N.E.2d 1187, 1189 (Ind. Ct. App. 2001). On review, we will not reweigh the

evidence, judge the credibility of witnesses, or substitute our judgment for that of the trial court. *Id.* We will reverse the trial court only if it has abused its discretion. *Id.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances, or reasonable inferences therefrom, that were before the court. *Id.*

An initial child custody order is determined in accordance with the best interests of the child. *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008) (quoting I.C. § 31-17-2-8). When making such a best interest determination, the trial court is to consider all relevant factors, including 1) the age and sex of the children; 2) the wishes of the parents; 3) the wishes of the children; 4) the interaction and interrelationship of the children with the parents, siblings, and other people who may significantly affect the child's best interests; 5) the children's adjustment to home, school, and community; 6) the mental and physical health of all individuals involved; 7) evidence of domestic abuse; and 8) evidence of care by a *de facto* custodian. *See* I.C. § 31-17-2-8. Evidence of a parent's drug or alcohol use can also be relevant to that parent's health and the child's best interests. *See Russell v. Russell*, 682 N.E.2d 513, 515 (Ind. 1997).

Here, the trial court's findings of facts and conclusions of law reveal that the trial court considered that Mother is the primary caretaker of the five- and ten-year-old girls. In addition, Mother has very supportive parents that have been very involved in the girls' lives. Father's father is deceased and Father presented no evidence of activities his mother is involved in with the children or whether she has a close bond with them. The trial court also considered that the children have adjusted to their parents' separation.

In addition, the court considered that Father has been participating in mental health counseling but failed to execute the releases necessary for wife's counsel to obtain records as he agreed pursuant to the parties' agreed provisional order. Father suffers from depression, and has threatened to kill himself in the past.

It is apparent that the trial court considered the evidence, balanced all of the factors relevant to the custody determination, and concluded that it was in the girls' best interests to award Mother primary physical custody. We find no abuse of the trial court's discretion.

III. Relocation

Last, Father argues that the trial court erred in granting Mother's motion to relocate. In 2006, our General Assembly amended the Family Law Title of the Indiana Code by adding Indiana Code section 31-17-2.2 concerning the relocation of the custodial parent. *Baxendale*, 878 N.E.2d at 1255. Relocation is defined as a change in the primary residence of an individual for a period of at least sixty days. *Id.* at 255-56. Where, as here, the non-relocating parent files a motion to prevent relocation, the relocating parent must prove that the relocation is made in good faith and for legitimate reason. *Swadner v. Swadner*, 897 N.E.2d 966, 975 (Ind. Ct. App. 2008) (citing I.C. § 31-17-2.2-5). If this burden is met, the non-relocating parent must prove that the proposed relocation is not in the child's best interests. *Id.*

In making its determination, the trial court shall consider 1) the distance involved in the proposed relocation; 2) the expense involved for the non-relocating parent to exercise visitation; 3) the feasibility of preserving the relationship of the nonrelocating individual and

the child through visitation; 4) whether there is an established pattern of conduct by the relocation individual to thwart the non-relocating parent's contact with the child; 5) the reasons provided by the relocating parent for the relocation; and 6) other factors affecting the best interest of the child. I.C. § 31-17-2.2-1. This statute also incorporates all of the factors considered in making an initial custody determination. *Baxendale*, 878 N.E.2d at 1256.

Here, the trial court considered Mother's health related issues, the job opportunities available to her in Arizona, and the support of her extended family in concluding that her reasons for moving are legitimate and not made to thwart husband's contact with his daughters. In determining whether the relocation is in the girls' best interests, the trial court considered that Mother's parents have offered to assist Father with his travel expenses to Arizona when he visits his daughters, and that the girls are of an age where they can communicate verbally and have regular contact with Father via telephone or have webcam/email communication. The court also considered that Mother is the girls' primary caretaker and has very supportive parents that will continue to be involved in the girls' lives and provide emotional and financial support to the family.

Again, it is apparent from the trial court's detailed order that the court thoughtfully considered the evidence, balanced all of the factors relevant to the relocation determination, and concluded it was in the girls' best interests to relocate with their Mother to Arizona. We

conclude that the trial court did not abuse its discretion in granting Mother's motion to relocate.

CONCLUSION

Based upon the foregoing, we find that the trial court did not err in distributing the parties' property, awarding primary physical custody of the parties' children to Mother, and granting Mother's motion to relocate.

Affirmed.

ROBB, C.J., and BROWN, J., concur.