

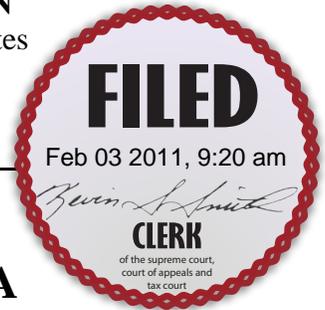
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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD N. BELL,)
)
Appellant–Cross-Appellee–Respondent,)
)
vs.)
)
NANCY D. BELL,)
)
Appellee–Cross-Appellant–Petitioner.)

No. 49A05-1005-DR-315

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather A. Welch, Judge
Cause No. 49D12-0811-DR-53868

February 3, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant–Cross-Appellee–Respondent Richard Bell (“Husband”) appeals from the trial court’s disposition of the marital estate following its dissolution of his marriage to Appellee–Cross-Appellant–Petitioner Nancy Bell (“Wife”). Husband contends that the trial court abused its discretion in deviating from an equal division of the marital estate, overvaluing Husband’s interest in his former law firm, and assigning Wife liquid assets while assigning Husband a long-term promissory note and that it erred in failing to order Wife to file joint tax returns for 2009. Wife cross-appeals, contending that the trial court incorrectly excluded Husband’s 2008 bonus from the marital estate, subtracted Husband’s negative capital account with his former law firm from the fair market value of his interest in the firm, and denied Wife’s request for attorney’s fees. We affirm.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on July 28, 1973, and during the course of their marriage had three children, all now emancipated. On November 26, 2008, Wife filed a dissolution petition; at the time, Wife was fifty-nine years old and Husband sixty-one. Husband graduated from college in 1970 and soon thereafter passed the Certified Public Accountant (“CPA”) examination. Husband became an attorney in 1975, most recently practicing with Cohen & Malad, LLP, in which he has a 15.2% interest. Husband earned \$337,189.00 in 2006, \$201,988.00 in 2007, and \$399,985.00 in 2008. In late 2007, Husband discussed with Wife his intention to retire from Cohen & Malad at the end of 2009, but did not formally announce his retirement by way of email to the managing partner until August 31, 2009. Husband is still a licensed attorney and CPA.

Wife holds a Master's degree in education but has been employed only sporadically over the years, as a kindergarten teacher from 1971 to 1977 (a job she left in order to take care of the couple's children), in retail part-time in the late 1990s, and with the Indiana University Center on Philanthropy from 2000 to 2004. The most Wife ever made in one year was \$29,047.00 in 2003. As of November 9, 2009, Wife was employed part-time in retail making \$8.00 per hour but had requested more hours at work and was seeking full-time employment. Vocational expert Michael Blankenship opined that Wife would "likely be able to command an annual income of \$30,000.00." Maintenance Hearing Petitioner's Ex. 3.

On December 20, 2008, after Wife filed her dissolution petition, Husband received a \$100,000.00 bonus from Cohen & Malad. At the hearing on Wife's dissolution petition, Cohen & Malad managing partner Irwin Levin testified that whether bonuses were paid was at his sole discretion; he did not determine that Husband would receive a 2008 bonus until December of 2008, or after Wife had filed her dissolution petition; and he was under no obligation to pay any bonus at all.

Bret G. Brewer testified that the value of Husband's 15.2 % interest in Cohen & Malad was worth \$425,600.00 as of December 31, 2008. Levin also testified that Husband had a negative capital account balance of \$83,231.00, which would have to be credited against any disbursement to Husband as a result of his leaving the firm at the end of 2009. Any distribution to Husband in exchange for his interest in Cohen & Malad upon his retirement would take the form of a promissory note the firm would repay over the course of ten or eleven years.

On February 10, 2010, the trial court issued its dissolution order. The trial court, *inter alia*, ordered that the marital estate was worth \$1,605,238.00 at the time of separation and that Wife would be assigned fifty-five percent and Husband forty-five. The trial court noted that Husband's earning ability "is substantially greater" than Wife's and that to the extent that his and Wife's economic circumstances were equivalent at the time of distribution, that situation was due to "Husband's action and voluntary choice." Appellant's App. p. 37. The trial court adopted Brewer's valuation of Husband's interest in Cohen & Malad at \$425,600.00 and subtracted Husband's negative capital account balance of \$83,231.00 for a net value of \$342,369.00. The trial court assigned all of Husband's interest in Cohen & Malad to Husband. The trial court determined that Husband's \$100,000.00 bonus for 2008 would not be included in the marital estate, concluding that he had no vested interest in it on the date of filing.

On March 10, 2010, Husband filed a motion to correct error, alleging that the trial court erred in valuing his interest in Cohen & Malad, dividing the marital estate unequally, and failing to order Wife to file a joint tax return for 2009. Husband submitted an affidavit with his motion in which he estimated that his tax liability for 2009 would be \$8721.00 greater if he filed separately as opposed to jointly with Wife. In Wife's response to Husband's motion to correct error, she requested attorney's fees for expenses incurred in responding to the motion. On April 20, 2010, the trial court denied Husband's motion to correct error in full and denied Wife's request for an award of attorney's fees.

DISCUSSION AND DECISION

When, as here, the trial court enters findings of fact and conclusions thereon, we apply the following two-tiered standard of review: we determine whether the evidence supports the findings and the findings support the judgment. *Clark v. Crowe*, 778 N.E.2d 835, 839 (Ind. Ct. App. 2002). The trial court's findings of fact and conclusions thereon will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* at 839-40. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* at 840. This court neither reweighs the evidence nor assesses the credibility of witnesses, but considers only the evidence most favorable to the judgment. *Id.*

Indiana Code section 31-15-7-5 (2008) provides as follows:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (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.

“Subject to the statutory presumption that an equal distribution of marital property is just and reasonable, the disposition of marital assets is committed to the sound discretion of the trial court.” *Augspurger v. Hudson*, 802 N.E.2d 503, 512 (Ind. Ct. App. 2004).

An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances, or the reasonable, probable, and actual deductions to be drawn therefrom. An abuse of discretion also occurs when the trial court misinterprets the law or disregards evidence of factors listed in the controlling statute. The presumption that a dissolution court correctly followed the law and made all the proper considerations in crafting its property distribution is one of the strongest presumptions applicable to our consideration on appeal. Thus, we will reverse a property distribution only if there is no rational basis for the award and, although the circumstances may have justified a different property distribution, we may not substitute our judgment for that of the dissolution court.

Id. (citations, quotation marks, and brackets omitted).

Husband’s Appeal Issues

I. Whether the Trial Court Abused its Discretion in Disposing of the Marital Estate

A. Unequal Division

Husband contends that the trial court abused its discretion in departing from the presumptive equal division of marital assets. Husband argues that his decision to retire has essentially equalized the respective financial situations of Husband and Wife and suggests that the decision was not unilateral but made with Wife’s blessing. Supporting the latter argument, Husband points to evidence that his decision to retire when he did was discussed with Wife and made before Wife notified him of her intent to file for

dissolution. It would be unfair, Husband argues, to punish him for retiring when it was a joint decision.

We conclude that there is ample evidence to support the trial court's unequal division of the marital estate, based on its findings that Husband's earning potential was superior to Wife's and that his situation was a result of his own voluntary choices. As for earning potential, Husband is licensed as an attorney and a CPA and earned an average of \$313,054.00 per year from 2006 to 2008. On the other hand, Wife has never earned more than \$30,000.00 in any year, and her earning potential is currently estimated to be, at most, \$30,000.00 per year. There is no indication that Husband suffers from any disability or medical condition that would prevent him from continuing to work, even if that work is not being done at Cohen & Malad. Moreover, there was evidence that Husband had engaged in discussions with Cohen & Malad to continue with them after retirement in an "of counsel" position. Tr. p. 596. Although Husband claims that his earning potential has been irreversibly diminished by the transfer of his clients and cases, this does not mean that it had been destroyed completely. Given Husband's past record of earnings and his current ability to practice as an attorney and a CPA, the trial court was entitled to conclude that his earning potential was far greater than Wife's.

As for Husband's contention that he should not be punished for a joint decision to retire, we would note that, even if the initial decision to retire had been made jointly, there is nothing in the record to indicate why Husband could not simply have changed his mind when Wife filed for dissolution. Moreover, although Husband testified that he had begun the process of transferring clients and cases to other attorneys by the time Wife

filed for dissolution, there is no evidence that those transfers were irreversible. The trial court did not abuse its discretion in concluding that Husband's financial situation, to the extent that his earning potential may be decreased, is the result of his own choices. The trial court did not abuse its discretion in ordering an unequal division of the marital estate based on its conclusion that Husband had greater future earning potential.

B. Value of Husband's Interest in Former Law Firm

Husband contends that the trial court greatly overvalued his interest in Cohen & Malad. As previously mentioned, the trial court adopted Brewer's valuation of Husband's interest in Cohen & Malad at \$425,600.00 and subtracted Husband's negative capital account balance of \$83,231.00 for a net value of \$342,369.00. Husband suggests, however, that we should remand and order the trial court to revalue the interest at \$285,000.00, which he contends was the actual amount he received from Cohen & Malad upon retirement at the end of 2009. Even if the value of the interest on December 31, 2009, was only \$285,000.00, that does not mean that this was its value on November 26, 2009, the date of separation, which is the date the trial court chose as the date of asset valuation. As the Indiana Supreme Court has made clear, "the trial court has discretion when valuing the marital assets to set any date between the date of filing the dissolution petition and the date of the hearing." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). The trial court did not abuse its discretion in this regard.

C. Assignment of Liquid Assets to Wife and Promissory Note to Husband

Husband also contends that the trial court abused its discretion in assigning the couple's house and the entire interest in Cohen & Malad to him, assets he describes as

illiquid and long-term, while assigning approximately eighty-five percent of the liquid retirement and investment accounts to Wife. While Husband notes that he would be solely burdened with any difficulties that may arise in collecting on the promissory note given him by Cohen & Malad, he points to no evidence whatsoever that there will be any difficulty in this regard. Husband also notes that while his tax burden is expected to be forty percent of the payment of the promissory note, he neither cites any evidence in the record to support this assertion, nor, for that matter, does he explain how this compares to Wife's expected tax burden related to her assets. Husband has failed to establish that the trial court abused its discretion in this regard.

II. Trial Court's Denial of Request to Order Wife to File Joint Tax Returns for 2009

Finally, Husband contends that the trial court erred in failing to order Wife to file a joint 2009 tax return, which he contends increased his liability by \$8721.00. Husband, however, raised this claim for the first time in his motion to correct error, and does not explain why he could not have made the request earlier. "A party may not raise an issue for the first time in h[is] motion to correct errors or on appeal." *Matter of S.L.*, 599 N.E.2d 227, 229 (Ind. Ct. App. 1992). Consequently, this issue is waived for appellate review.

Wife's Cross-Appeal Issues

I. Exclusion of Husband's 2008 Bonus from Marital Estate

Wife contends that Husband's 2008 bonus, which was paid after she filed her dissolution petition, should have been included in the marital estate. Indiana Code

section 31-15-7-4 (2008) provides that the marital estate that the trial court must divide in a dissolution proceeding is comprised of the property owned or acquired by either party before the “final separation of the parties[,]” which is defined as “the date of filing of the petition for dissolution of marriage[.]” Ind. Code § 31-9-2-46 (2008). In other words, the marital estate is set at the time of the filing of the dissolution petition, which, in this case, was before Husband received his bonus. In this context, however, “property” is not limited just to property in-hand when the dissolution petition is filed.

While “[i]t has long been the law in this State that future earnings are not considered part of the marital estate for purposes of property division[,]” *Beckley v. Beckley*, 822 N.E.2d 158, 160 (Ind. 2005), a right to receive future payments can be considered property. Some of these instances are governed by statute. Indiana Code section 31-9-2-98 (2008) provides, in relevant part, that

‘[p]roperty’ ... means all the assets of either party or both parties, including:

...

- (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in Section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage; and
- (3) the right to receive disposable retired or retainer pay (as defined in 10 U.S.C. 1408(a)) acquired during the marriage that is or may be payable after the dissolution of marriage.

Additionally, Indiana Courts have, on occasion, determined that certain rights to future payment constitute “property” to be included in a marital estate, even if not covered by the above statute. *See Leisure v. Leisure*, 589 N.E.2d 1163, 1170 (Ind. Ct. App. 1992) (concluding that the predecessor to Indiana Code section 31-9-2-98 did not

“purport to exclude property” and that payments not covered by 10 U.S.C. 1408 may nevertheless be considered property). For example, in *Henry v. Henry*, 758 N.E.2d 991, 994 (Ind. Ct. App. 2001), we concluded that “matured” stock options that could have been converted into cash prior to the final dissolution hearing were to be included in the marital estate. Also, in *Sedwick v. Sedwick*, 446 N.E.2d 8, 10 (Ind. Ct. App. 1983), we concluded that future payments from a structured settlement annuity accepted in payment for services rendered constituted property within the marital estate.

The common denominator in all of the above examples is that the interest in the future payment was “vested.” “Indiana’s ‘one pot’ theory prohibits the exclusion of any asset in which a party has a *vested interest* from the scope of the trial court’s power to divide and award.” *Hann v. Hann*, 655 N.E.2d 566, 569 (Ind. Ct. App. 1995), *trans. denied* (emphasis added). “The word ‘vest’ generally means either vesting in possession or vesting in interest.” *In re Marriage of Preston*, 704 N.E.2d 1093, 1097 (Ind. Ct. App. 1999) (citing *Brown v. American Fletcher Nat’l Bank*, 519 N.E.2d 166, 168 (Ind. Ct. App. 1988), *reh’g denied*). “Vesting in possession connotes an immediate existing right of present enjoyment, while vesting in interest implies a presently fixed right to future enjoyment.” *Preston*, 704 N.E.2d at 1097.

Here, there was evidence to support the trial court’s conclusion that Husband’s interest in his 2008 bonus had not yet vested on November 26, 2008. Levin testified that there was no guarantee that any bonus would be paid in a given year, the decision whether to pay any bonus was entirely up to him, he had no criteria he was required to follow, the decision to pay a 2008 bonus was not made until December of 2008, and

Husband would not have been entitled to a bonus had he left Cohen & Malad in mid-November 2008. This evidence supports the conclusion that, even though the period for which the bonus was awarded ended on October 31, 2008, Husband had no presently-fixed right to future enjoyment of the bonus until December 2008 at the earliest, after Wife filed her dissolution petition. The trial court properly excluded Husband's 2008 bonus from the marital estate.

II. Subtraction of Husband's Negative Capital Account from the Value of his Interest in His Former Law Firm

Wife contends that the trial court wrongly subtracted the balance of Husband's negative capital account with Cohen & Malad from the value of his interest in the firm because the partnership agreement does not specifically require that he repay the negative balance upon leaving. All that matters here, however, is whether there was sufficient evidence to sustain a finding that Husband would, in fact, have to account for the negative balance upon leaving. On this point, Levin testified that Husband's negative capital account balance was "a deduction from what he's gonna get" upon leaving the firm. Tr. p. 578. Levin's testimony is sufficient to sustain a finding that the deduction, proper or not, would be made upon Husband's leaving, thereby justifying the trial court's subtraction of that balance from the value of Husband's interest in Cohen & Malad.

III. Denial of Wife's Request for Attorney's Fees

Pursuant to Indiana Code section 31-15-10-1 (2008), Wife requested that the trial court award fees for expenses incurred responding to Husband's motion to correct error, a request the trial court summarily denied. Wife contends that the denial was improper in

that there is no indication that the trial court considered factors required by our case law and that it did not hold an evidentiary hearing on the request.

Indiana Code section 31-15-10-1(a) authorizes the trial court to order a party to pay a reasonable amount for the cost to the other party of maintaining a dissolution proceeding. This includes the award of reasonable appellate attorney fees. *Beeson v. Christian*, 594 N.E.2d 441, 443 (Ind. 1992). Moreover, the trial court “enjoy[s] broad discretion in awarding allowances for attorney’s fees. Reversal is proper only where the trial court’s award is clearly against the logic and effect of the facts and circumstances before the court.” *Selke v. Selke*, 600 N.E.2d 100, 102 (Ind. 1992). In other words, we review such awards only for an abuse of discretion. *Holman v. Holman*, 472 N.E.2d 1279, 1288 (Ind. Ct. App. 1985). In assessing attorney fees, however, the court *must* consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors, which bear on the reasonableness of the award. *Selke*, 600 N.E.2d at 102 (emphasis added) (citations omitted).

....

While we recognize the trial court’s “inherent authority to make allowances for attorney fees ... in the interest of seeing that equity and justice is done on both sides[,]” *Crowe v. Crowe*, 247 Ind. 51, 211 N.E.2d 164, 167 (1965), the trial court “must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such other factors as bear on the reasonableness of the award.” *Barnett v. Barnett*, 447 N.E.2d 1172, 1176 (Ind. Ct. App. 1983).

Bertholet v. Bertholet, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000) (first ellipsis added).

Wife has failed to establish that the trial court abused its discretion in denying her fee request. The trial court’s very thorough thirty-two-page dissolution order clearly indicates that it considered in great depth such factors as Husband’s and Wife’s resources, their economic situations, and their earning potential. Wife does not explain how the trial court’s consideration of such factors should be any different in a fee request context. Moreover, Wife points to no other factor that might bear on the question of attorney’s fees that the trial court did not consider, and none is apparent to us. Given the

trial court's very thorough consideration of Husband's and Wife's economic situations reflected in its dissolution order, Wife has failed to establish that it abused its discretion in this regard.

Wife relies on *Bertholet* and *Barnett*, in which the trial courts' failures to hold evidentiary hearings on fee requests were found to be abuses of discretion. Those cases, however, are factually distinguishable. In both *Bertholet* and *Barnett*, there is no indication that the trial courts considered "the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such other factors as bear on the reasonableness of the award." *Barnett*, 447 N.E.2d at 1176. Here, the trial court's dissolution order makes clear that it gave thoughtful consideration to those factors. Moreover, the records in *Bertholet* and *Barnett* contained scant evidence regarding the parties' economic positions, so the trial courts had no factual bases on which to dispose of the fee requests. *See Bertholet*, 725 N.E.2d at 501, *Barnett*, 447 N.E.2d at 1176. In contrast, the record generated here in the various hearings contains voluminous evidence bearing on the factors mentioned in *Bertholet*. We conclude that *Bertholet* and *Barnett* in this case do not require further consideration by the trial court or an additional evidentiary hearing on the matter of Wife's request for fees.

We affirm the judgment of the trial court.

KIRSCH, J., and CRONE, J., concur.