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IN THE
COURT OF APPEALS OF INDIANA

JOEL C. HAMMOND, M.D.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 29A04-0604-CV-204
	)	
THALIA HAMMOND,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel Pfleging, Judge
Cause No. 29D02-0305-DR-421

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joel C. Hammond, M.D. ("Father"), appeals the trial court's order that he pay 90% of the post-secondary educational expenses of his oldest child and that the listing price of the marital residence be reduced and he pay his ex-wife Thalia Hammond ("Mother") the difference between $837,000 and the actual selling price of the residence. Mother cross-appeals arguing that the trial court failed to rule on her request for attorney fees. Because the trial court did not make adequate findings to justify and explain its order for post-secondary educational expenses, we remand this case. In addition, the trial court improperly modified the settlement agreement between the parties by ordering Father to pay Mother the difference between $837,000 and the actual selling price of the marital residence; therefore, this provision may not be contained in the order on remand. Finally, because the trial court failed to rule on Mother's request for attorney fees, the trial court should address this issue on remand. Reversed and remanded.[1]

Facts and Procedural History

Father and Mother married in 1984. Father is an Indianapolis surgeon who had $220,355 in wages and $34,889 in additional income in 2004. Mother currently has a part-time job and is working toward her master's degree in philanthropic studies.[2]

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[1] We hereby grant Mother's August 21, 2006, Motion to Strike the portion of Father's appendix containing Exhibit A and all references to it in his brief because Exhibit A was not admitted into evidence at trial. Father's argument that he is not asking the reviewing court to consider evidence that was not admitted at trial, but rather only included it in his appendix to present an occurrence at trial, is disingenuous. Father's attempt to persuade us with evidence that was not admitted at trial is inappropriate.

[2] For the previous seventeen years, Mother was a stay-at-home mom and worked part-time in Father's doctor's office.

According to Mother, her weekly income is $679.[3] Father and Mother have two children, C.L.H., born February 17, 1987, and H.L.H., born July 31, 1989. In May 2003, Mother filed a petition for legal separation, and in September 2003, Father filed a Counter-Petition for Dissolution of Marriage. The parties entered into an Agreement of Settlement ("the Agreement") on May 27, 2004, and the trial court approved the Agreement and entered a Decree of Dissolution of Marriage the next day. The Agreement, which was reached after mediation, is comprehensive and addresses several topics, only a few of which are relevant to this appeal. As for custody, the Agreement provides:

> [Mother] shall have sole physical and legal custody of the minor children of the marriage. Provided, however, the parties shall share equally the authority and responsibility for major decisions concerning the children's education. Decisions regarding the children's education will be made after consultation.

Appellant's App. p. 19-20. With regard to the children's Post High School Educational Expenses,[4] the Agreement provides:

> The parties shall, once the choice of college for each child is known, attempt to agree upon the allocation of Post High School Education expense. If no agreement is reached, the matter shall then be submitted to the Court for determination.

Id. at 22. As for the parties' marital residence on Crooked Stick Golf Course in Carmel, Indiana, at the time of the divorce proceedings, it was listed for sale at $985,000. Pursuant to the Agreement, however:

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[3] This figure amounts to $35,308 per year.

[4] The Agreement also provides that Father "shall pay the cost of the children's attendance at Park Tudor School, as billed by Park Tudor School." Appellant's App. p. 22.

> The listing price shall be, at Decree, immediately reduced to $950,000. This listing price shall then be reduced four percent (4%) at the expiration of every forty-five (45) day period thereafter. Provided, however, the listing price shall not be reduced below $837,000 except by Order of the Court. The marital residence shall continuously be listed for sale until sold. [Mother] shall maintain the marital residence in "showable condition" and cooperate in all showings.

Id. at 24. Pending sale of the marital residence, Father was ordered to pay "the mortgage(s), insurance, and minimum toward the real estate taxes necessary to keep the property from tax sale. [Father] shall have the deduction for the mortgage interest and real estate taxes (during the pendency and post Decree) on his 2004 income taxes." *Id.* In addition, at closing, Father

> shall be reimbursed . . . (before payment of the net closing proceeds to [Mother]) in the amount of the principal reduction in the mortgage(s), the homeowners insurance payments, the real estate taxes, all "fix up" and/or repair expenses, and all cost of repairs required as a condition of the purchase contract paid after April 30, 2004. [Mother] shall then receive the balance of the net proceeds of the sale of the Marital Residence after payment of said amounts due [Father], the first and second mortgages, closing costs, real estate taxes, realtor commissions, and payments required by purchasers in the purchase contract.

Id. at 25.

Because the marital residence still had not sold nearly one year later, on May 23, 2005, Father filed a Verified Petition to Reduce Listing Price of Former Marital Residence. For the academic year 2005-2006, the parties' oldest child, C.L.H., was enrolled as a freshman in the architecture program at the University of Cincinnati; as a result, on July 12, 2005, Mother filed a Motion for College Expenses. Following a hearing on each motion, on March 21, 2006, the trial court issued an Order for both motions. That Order provides:

> 1. The listing price of the marital residence may be reduced and the home sold at whatever price the market allows. However, [Father] shall owe [Mother] the difference between the actual selling price of the residence and Eight Hundred and Thirty-Seven Thousand Dollars ($837,000.00). This amount, if any, shall be paid in equal monthly installments over a period of thirty-six (36) months.
> 2. The Post-secondary education expenses shall be paid Ninety-percent (90%) by [Father] and Ten-percent (10%) by [Mother].
> 3. Evidence presented to the Court showed that Mother has paid all expenses for [C.L.H.]'s education at the University of Cincinnati for the academic year 2005-2006. Due to the position of the real estate and lack of communication between the parties regarding [C.L.H.]'s college choice, [Father] is ordered to reimburse [Mother] his percentage of the expenses based on the cost of attendance at Ball State University[5] for the same academic year.
> 4. Until the sale of the marital residence is completed, [Father] shall pay his appropriate percentage of post-secondary education expenses based upon the cost of [C.L.H.] attending Ball State University. Upon completion of the sale of the marital residence, [Father] shall then pay his appropriate percentage of costs for [C.L.H.]'s actual post-secondary education expenses at the University of Cincinnati.

Id. at 9-10. Father appeals the trial court's order that he pay 90% of C.L.H.'s post-secondary educational expenses and that he pay Mother the difference between $837,000 and the actual selling price of the marital residence. Mother cross-appeals arguing that the trial court failed to rule on her request for attorney fees.

Discussion and Decision

I. Father's Appeal

A. Post-Secondary Educational Expenses

Father contends that the trial court erred by ordering him to pay C.L.H.'s post-secondary educational expenses without making adequate findings to justify and explain its order. A multitude of considerations impact a decision to order an award of post-

[5] Ball State University, an in-state school, also has an architecture program. C.L.H. applied to and was accepted at Ball State.

secondary educational expenses. *Quinn v. Threlkel*, 858 N.E.2d 665, 670 (Ind. Ct. App. 2006). Indiana Code § 31-16-6-2(a)(1) provides that an award of such expenses should take into account:

> (A) the child's aptitude and ability;
> (B) the child's reasonable ability to contribute to educational expenses through:
> (i) work;
> (ii) obtaining loans; and
> (iii) obtaining other sources of financial aid reasonably available to the child and each parent; and
> (C) the ability of each parent to meet these expenses.

The Child Support Guidelines' commentary on post-secondary educational expenses further states:

> It is discretionary with the court to award post-secondary educational expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.
>
> If the Court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration the incomes and overall financial condition of the parents and the child, education gifts, education trust funds, and any other education savings program. The court should also take into consideration scholarships, grants, student loans, summer and school year employment and other cost-reducing programs available to the student. . . .
>
> A consideration of the foregoing factors is addressed in the Worksheet on Post-Secondary Education Expense *which should be utilized in making a fair distribution of this expense.*
>
> The court should require that a student maintain a certain minimum level of academic performance to remain eligible for parental assistance and should include such a provision in its order. . . .

Ind. Child Support Guideline 6, cmt. (emphasis added). The commentary also suggests that courts "may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school." *Id.*

In the recent case of *Payton v. Payton*, this Court held that it could not adequately review the trial court's child support order where the parties had not submitted verified child support worksheets and the trial court had not entered adequate findings to justify and explain its order. 847 N.E.2d 251, 253-54 (Ind. Ct. App. 2006). As a result, we remanded for the trial court to enter more complete findings or to obtain and adopt a party's verified child support worksheet. *Id.* at 255.

Similar to the situation in *Payton*, in the more recent case of *Quinn*, the trial court neither obtained and adopted a party's verified post-secondary education worksheet, nor did it make findings paralleling the worksheet. 858 N.E.2d at 671. Instead, the court made general findings to the effect that the mother should pay 29% of the daughter's college expenses and the father 71%, that they would have to repay student loans the daughter had already taken out using that same percentage split, and that the daughter was forbidden from taking out any additional student loans, "given the parties' incomes and resources available to pay for the child's education." *Id.* (record citation omitted). There were no findings regarding the estimated cost of attending Franklin College, what percentage of that cost should be borne by the daughter, and what type of financial aid she was expected to receive. *Id.* Indeed, there was no requirement in the trial court's

order that the daughter apply for financial aid of any kind. *Id.* As a result, the Court held, "That alone makes the trial court's current order inadequate." *Id.* (citing *Carr v. Carr*, 600 N.E.2d 943, 946 (Ind. 1992) (reversing trial court's post-secondary education expense order where it did not place any responsibility on student to actually seek grants, loans, or employment)).

The court also observed that the trial court did not adopt any worksheet submitted by the parties. *Id.* Although one worksheet was introduced into evidence, it was not verified. *Id.* Even though the evidence showed that the daughter evidently qualified for and accepted financial aid in the form of scholarships, grants, student loans, and work-study, the court noted that neither the proffered worksheet nor the trial court's findings acknowledged this. *Id.* As such, the court concluded that "remand is necessary for the trial court to either adopt a verified, properly completed post-secondary education expense worksheet submitted by one of the parties, or to enter its own findings based on the requirements of the worksheet." *Id.*

We have the same difficulty in the present case. The trial court neither adopted a party's verified post-secondary education worksheet, nor did it make findings paralleling the worksheet. Although Mother offered a Post-Secondary Education Worksheet into evidence at the hearing, it was not signed by either Mother or Father, and the trial court admitted it into evidence only as to *Mother's* information. *See* Tr. p. 162. Instead, the trial court made general findings that Father should pay 90% of C.L.H.'s post-secondary educational expenses and Mother 10%, that for the 2005-2006 academic year Father shall reimburse Mother his percentage of the expenses based on the cost of attending Ball State

University, and that until the marital residence sells, Father shall pay his percentage of the expenses based upon the cost of attending Ball State University. There were no findings regarding the estimated cost of attending either the University of Cincinnati or Ball State University, what percentage of the costs should be borne by C.L.H., and what type of financial aid she is receiving and expected to receive. Indeed, there was no requirement in the trial court's order that C.L.H. apply for financial aid of any kind. As in *Quinn*, "That alone makes the trial court's current order inadequate." *Id.* (citation omitted). In addition, there was no requirement in the trial court's order that C.L.H. "maintain a certain minimum level of academic performance to remain eligible for parental assistance." *See* Child.Supp. G. 6, cmt. Similar to *Quinn*, remand is necessary in this case for the trial court to either adopt a verified, properly completed post-secondary education expense worksheet submitted by one of the parties or to enter its own findings based on the requirements of the worksheet.

Because other issues addressed in this appeal are likely to resurface on remand, we briefly address them now. First, Father argues that the trial court cannot order him to pay his percentage of the expenses at Ball State University and then increase it to his percentage of the expenses at the University of Cincinnati once the marital residence sells. He alleges that this prospective modification of the child support order is improper because it does not follow Indiana Code § 31-16-8-1's requirements. *See* Ind. Code § 31-16-8-1 (providing that child support order may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable or that a party has been ordered to pay an amount in child support that differs by more

than twenty percent from the amount that would be ordered by applying the child support guidelines). Mother responds that this is not a prospective modification of child support; rather, it is "a partial abatement of [Father's] college support order during the period when he is required to pay expenses related to the marital residence, which remains unsold." Appellee's Br. p. 20. Indeed, Mother cross-appeals on this very issue, arguing instead that Father should have to pay his percentage of the expenses at the University of Cincinnati.

We find no error in the trial court's crafting of this payment arrangement for Father. In essence, the trial court was ordering Father to pay his percentage of the expenses at the University of Cincinnati but reducing that amount during the time period that he was also paying the mortgage and other expenses related to the marital residence. The trial court was simply taking into account Father's "ability . . . to meet these expenses," which Indiana Code § 31-16-6-2(a)(1)(C) requires the court to do.[6]

Next, Father argues that the trial court erred in ordering him to pay his percentage of the expenses for C.L.H.'s six-year Master's degree program at the University of Cincinnati. However, the trial court's order does not address whether Father and Mother are required to pay for a four-year degree or a six-year degree for C.L.H.; therefore, this issue will have to be addressed on remand, taking into account Father's and Mother's ability to meet the expenses of an additional two years of schooling.

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[6] Father strenuously argues on appeal that he is "financially unable to meet the expenses of [C.L.H.]'s college education." Appellant's Br. p. 45. In crafting its new order on remand, the trial court, taking into account Father's evidence, should address Father's ability to meet these expenses.

Finally, Father argues that because he was not consulted on C.L.H.'s college choice, he should only have to pay his percentage of the expenses for an in-state school. Father relies on the provision of the Agreement providing, "Decisions regarding the children's education will be made after consultation." Appellant's App. p. 20. Father asserts that consultation is a "condition precedent" to his requirement to pay for C.L.H.'s post-secondary educational expenses. Appellant's Br. p. 41. However, the Agreement specifically provides, "The parties shall, once the choice of college for each child is known, attempt to agree upon the allocation of Post High School Education expense. If no agreement is reached, the matter shall then be submitted to the Court for determination." Appellant's App. p. 22. Contrary to Father's assertion, consultation is not a condition precedent to his requirement to pay for C.L.H.'s post-secondary educational expenses. That is, Father's requirement to pay is not dependent upon the consultation requirement. However, in light of the particular circumstances of this case, including C.L.H.'s attendance at an out-of-state university, on remand the trial court may take into account Mother's failure to consult with Father as one of several factors in determining the proper allocation of post-secondary educational expenses.

B. Sale of Marital Residence

Next, Father contends that the trial court erred by ordering him to pay Mother the difference between $837,000 and the actual selling price of the marital residence. Father argues that this was an improper modification of the Agreement, which the trial court incorporated and merged into its Decree of Dissolution of Marriage. Upon dissolution of a marriage, the parties are free to draft their own settlement agreement. *White v. White*,

819 N.E.2d 68, 70 (Ind. Ct. App. 2004). Such agreements are contractual in nature and become binding upon the parties once the trial court merges and incorporates such into the divorce decree. *Id.* To that end, Indiana Code § 31-15-2-17(c) provides, "The disposition of property settled by an agreement . . . and incorporated and merged into the decree is not subject to subsequent modification by the court, except as the agreement prescribes or the parties subsequently consent." Indeed, the Agreement here provides, "No modification or waiver of any of the terms of this Agreement shall be valid, unless in writing and executed by both parties hereto." Appellant's App. p. 30.

Regarding the marital residence, the Agreement between the parties provides:

> The listing price shall be, at Decree, immediately reduced to $950,000. This listing price shall then be reduced four percent (4%) at the expiration of every forty-five (45) day period thereafter. Provided, however, the listing price shall not be reduced below $837,000 except by Order of the Court.

Id. at 24. However, the trial court's subsequent Order provides:

> The listing price of the marital residence may be reduced and the home sold at whatever price the market allows. *However, [Father] shall owe [Mother] the difference between the actual selling price of the residence and Eight Hundred and Thirty-Seven Thousand Dollars ($837,000.00).* This amount, if any, shall be paid in equal monthly installments over a period of thirty-six (36) months.

Id. at 9 (emphasis added). According to the Order, if the listing price of the marital residence is reduced below $837,000 and the residence sells under that amount as well, Father must pay Mother the difference between $837,000 and the actual selling price. This provision is simply not part of the Agreement between the parties, and the parties did not agree to it in writing either. Although the trial court has the authority to reduce the listing price of the marital residence, the court does not have the authority to order

Father to pay Mother the difference between $837,000 and the actual selling price of the residence. While it is unfortunate for Mother that there is no provision in the Agreement for reallocating marital equity in the event that the marital residence sells for less than $837,000, the absence of such a provision leads to the conclusion that by the terms of the Agreement, Mother agreed to assume that specific risk. Both parties were represented by counsel, and if a different result had been intended, it could have been and should have been included in the Agreement. Because this is the bargain that Mother clearly and freely negotiated, the trial court improperly modified the Agreement between the parties. On remand, the trial court may not include such a provision in its order.

II. Mother's Cross-Appeal

Mother contends that the trial court erred by failing to rule on her request for attorney fees. The record shows that Mother's attorney requested attorney fees at one of the hearings and that the trial court granted her leave to submit an affidavit of attorney fees, which she subsequently filed. However, it appears that the trial court never ruled on Mother's request for attorney fees. Therefore, the trial court should rule on this issue on remand.

Reversed and remanded.

CRONE, J., concurs.

BAKER, J., concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

JOEL C. HAMMOND, M.D.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 29A04-0604-CV-204
	)	
THALIA HAMMOND,	)	
	)	
Appellee-Petitioner.	)	

BAKER, Judge, concurring in part and dissenting in part.

I agree with the majority's decision to remand the issue of C.L.H.'s post-secondary educational expenses to the trial court because of its lack of findings on the issue. I pause, however, to note that I believe the trial court would have to find extraordinary circumstances to justify requiring Father to pay such a high percentage of C.L.H.'s post-secondary education expenses at the six-year out-of-state school.

Turning to the second issue, I respectfully disagree with the majority's conclusion that it was improper for the trial court to require Father to pay Mother the difference between $837,000 and the actual sale price of the marital residence. Mother and Father entered into an Agreement regarding the disposition of their marital assets. In reaching

that Agreement, Mother was to receive the net proceeds of the sale of the marital residence and the parties assumed that the residence's value would be no less than $837,000. When the trial court granted Father's request to lower the list price of the residence below $837,000, it properly exercised its equitable jurisdiction by requiring Father to offset the reduction. Nothing in the Agreement says that Mother alone bears the risk of loss with respect to the marital residence. Without express language stating otherwise, I believe that the Agreement implicitly contemplated both Mother and Father bearing the financial risks associated with selling the marital residence.

Put another way, pursuant to the Agreement, Mother and Father each received a bargained-for share of the marital assets. When the trial court allowed the sale price of the marital residence to fall below $837,000 pursuant to Father's request, it also lowered the value of Mother's share with no consequences to Father. By ordering Father to pay Mother the difference between $837,000 and the sale price, the trial court properly exercised its equitable jurisdiction to reapportion the value of each party's share and fulfill the intent of the Agreement. Because the Agreement does not explicitly state that Mother alone bore the risk of loss with respect to the marital residence, I do not believe that it was error for the trial court to require Father to pay Mother the difference between $837,000 and the actual sale price.

In all other respects, I concur.