

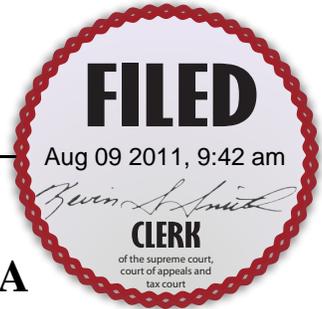
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**IN THE  
COURT OF APPEALS OF INDIANA**

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GABRIEL L. HILL,

Appellant-Respondent,

vs.

JANA E. HILL,

Appellee-Petitioner.

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No. 49A02-1009-DR-1193

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable David J. Dreyer, Judge  
Cause No. 49D10-0901-DR-1042

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**August 9, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

In his appeal of the trial court's Decree of Dissolution, Gabriel L. Hill ("Husband") appeals the division of the marital estate and child support order. Husband raises the following restated issues for our review:

- I. Whether the trial court erred by failing to adjust the child support order to reflect that Husband paid an income tax rate higher than that assumed in the Child Support Guidelines;
- II. Whether the trial court abused its discretion in ordering Husband to pay a share of extracurricular expenses that he claims are included in the basic child support obligation;
- III. Whether the trial court erred in awarding Wife 65% of the marital estate and by failing to consider separate funds in Wife's account;
- IV. Whether the trial court erred in giving Jana E. Hill ("Wife") a portion of the assets Husband accumulated after the parties physically separated and also after the filing of the petition for dissolution; and
- V. Whether the trial court erred by ordering Husband to pay Wife's attorney fees.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The parties were married on January 15, 1999 and Wife filed a petition for dissolution of marriage on January 2, 2009. The parties have two children. Husband is employed by a federal agency and earns \$108,638.00 annually, and Wife is employed by a state university and earns \$34,996.00 per year.

On December 18, 2009, the trial court held a final hearing on Wife's petition. Because Husband had not fully responded to Wife's discovery requests, the court bifurcated the hearing, addressing at that time only the issues regarding jurisdiction and custody of the

children and deferring the issues related to property distribution and debt. The court determined that Wife would have sole custody of the parties' children, set parenting time for Husband, and provided for the payment of child support and related healthcare and medical expenses.

On April 23, 2010, the second hearing was held. The court determined that the only asset in the marital estate was a Thrift Savings Plan ("TSP") retirement account in Husband's name. *Id.* The balance as of December 31, 2009 was \$138,391.00. Finding that the statutory presumption of an equal division of the marital property had been rebutted by a showing of the disparity in the parties' incomes and economic circumstances, the trial court set aside sixty-five percent (65%) or \$89,954.00 of the TSP to Wife and the balance to Husband.

Additionally, the trial court found that Husband was in arrears in the amount of \$14,162.19 as a result of his failure to comply with the December 18<sup>th</sup> Order relating to the expenses concerning retroactive child support, uninsured medical costs, and extracurricular activities and entered judgment against him in this amount. Finally, the trial court ordered Husband to pay the entirety of Wife's attorney fees of \$11,976.50 in attorney's fees. Husband now appeals.

## **DISCUSSION AND DECISION**

### **I. Child Support Guidelines**

Husband asserts that the trial court erred by failing to consider additional taxes he paid as a resident of Puerto Rico, a prior child support obligation, and that the court misinterpreted the itemized tax deduction taken for mortgage interest in calculating his child support

obligation. While Husband claims this is a pure question of law and should be reviewed under a de novo standard, we find it to be a question of sufficiency of the evidence—namely, whether Husband produced substantial evidence in support of his request for a deviation from the child support guidelines.

We may consider only the facts and inferences favorable to the trial court’s child support decision. *Bojrab v. Bojrab*, 786 N.E.2d 713, 736 (Ind. Ct. App. 2003). Factual findings are not clearly erroneous unless the evidence contains no facts or reasonable inferences therefrom to support the findings. *Id.* at 735-36. If a party produces substantiated evidence that he or she pays a tax rate very different from the presumed rate under child support guidelines, the trial court may take that variation into account when calculating child support. *Id.* at 740.

Here, the trial court advised that the guidelines take into account the varying rates at which people pay taxes throughout the country and informed Husband that a deviation from the guidelines could be granted upon a showing of the uniqueness of his tax situation. *Tr.* at 67-69. Husband failed to do so. Here, to determine Husband’s income and child support obligation, the trial court used the parties’ joint federal and state tax returns for 2008 and adopted the worksheet offered by Wife. The worksheet had a weekly income figure for Husband and Wife of \$2,089.19 and \$673.08, respectively. *Tr.* at 65. Husband asserts that the income figure is a gross misstatement because it fails to account for the fact that he pays a 35% Puerto Rican income tax. *Id.* at 44. The guidelines require a party to verify their claimed income with “substantial documentation.” Ind. Child Support Guideline 3(B)(2).

Husband, however, failed to introduce evidence in support of his contentions, and contrary to Husband's contentions, the worksheet adopted by the trial court took into account the support Husband paid for a prior child.

The trial court also specifically advised Husband that the matter could be revisited upon a showing of the uniqueness of his tax situation, and again advised him of his appeal right. *Tr.* at 67-69. Following the hearing on December 18, 2009, Husband filed a "Motion to Correct Errors" on January 19, 2010, and provided a document calculating his adjusted weekly earnings as \$1,415.48. *Appellant's App.* at 43-45. In Husband's motion to correct error, there were no supporting documents confirming the \$1,415.48 weekly salary which he claimed, and the motion was deemed denied.

Accordingly, we conclude that the sum the trial court used to calculate Husband's child support obligation was appropriate and support its finding of Husband's obligation of \$423.92 per week.

## **II. Extracurricular Expenses**

Husband asserts that the trial court abused its discretion by requiring him to pay 75% of expenses for the children's extracurricular activities that were included as part of his child support obligation.

Wife requested that Husband reimburse a portion of the expenses paid for past extracurricular activities including Cub Scouts events, basketball leagues, summer camps and similar activities totaling \$3,847.75, thereby making his share of the obligation \$2,885.91. Wife also requested that he pay a portion of future extracurricular expenses. For future

extracurricular expenses, the trial court conditioned reimbursement upon notice to Husband and granted him the right to object within fourteen days should he not approve of the activity or expense. The trial court calculated the reimbursement amount based on the parties' income as presented in Wife's child support worksheet, and attributed 75% of the cost to Husband and the remaining 25% to Wife. *Tr.* at 65, 70.

In the Child Support Rules and Guidelines, Guideline 8 regarding Extraordinary Expenses explains in part:

The economic data used in developing the Child Support Guideline Schedules do not include components related to those expenses of an "optional" nature such as costs related to summer camp, soccer leagues, scouting and the like. When both parents agree that the child(ren) may participate in optional activities, the parents should pay their pro rata share of these expenses. In absence of an agreement relating to such expenses, assigning responsibility for the costs should take into account factors such as each parent's ability to pay, which parent is encouraging the activity, whether the child(ren) has/have historically participated in the activity, and the reasons a parent encourages or opposes participation in the activity.

Child Supp. G. 8

The trial court correctly followed the procedure regarding extracurricular expenses as set out by the guidelines and, therefore, we will not disrupt the trial court's decision requiring Husband to contribute to a portion of the children's extracurricular expenses calculated in reference to each party's income and earning capacity.

### **III. Unequal Division of Marital Estate**

Husband claims that the trial court erred in awarding Wife 65% of the assets from the marriage where the parties were only living together for almost seven years, or that it failed to make the division it intended by ignoring Wife's \$33,000 in accounts. Generally, there is a

presumption that an equal distribution of marital property is just and reasonable. Ind. Code § 31-15-7-5. However, there are factors that can serve to rebut the presumption of equally dividing the marital estate. *Hyde v. Hyde*, 751 N.E.2d 761, 765-66 (Ind. Ct. App. 2001). Included in such factors are the economic circumstances, earnings and earnings ability of each of the parties. *Id.*

On appeal, if a party challenges the division of assets between the parties, that party must overcome a strong presumption that the court considered and complied with the applicable statute. *Bojrab*, 786 N.E.2d at 723. When we review the division, our focus is on what the court did, not what the court could have done. *Akers v. Akers*, 729 N.E.2d 1029, 1032 (Ind. Ct. App. 2000). “Even if the facts and reasonable inferences might allow us to reach a conclusion different from the one reached by the trial court, we will not substitute our judgment for the trial court’s unless the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court.” *Id.*

The trial court awarded Wife 65% of the marital estate on the basis of the parties’ economic circumstances and earning abilities. *Appellant’s App.* at 16-17. The trial court determined Husband’s income to be \$108,638.00 and Wife’s to be \$34,996.00, based on 2008 tax returns. *Appellant’s App.* at 13. The disparity in the earnings and earnings ability of the parties justifies the trial court’s decision to set aside 65% of the marital estate to Wife.

#### **IV. Division of Assets**

Husband argues that the trial court erred in giving Wife a portion of his savings plan that he accumulated after the parties physically separated in 2005 and after the filing of the

petition for dissolution in 2009. The marital estate is to be closed at the time of the filing of the petition for dissolution. *Wilson v. Wilson*, 732 N.E.2d 841, 846 (Ind. Ct. App. 2000). The trial court established the date of separation and the date of the closing of the marital estate as of the date the petition was filed, January 2, 2009. *Appellant's App.* at 9, 12. However, a trial court has broad discretion in determining the date upon which to value marital assets and may select any date between the date of filing the petition for dissolution and the date of the final hearing. *Nowels v. Nowels*, 836 N.E.2d 481, 485 (Ind. Ct. App. 2005).

The trial court awarded Wife 65% of the marital estate, including 65% of Husband's TSP account as of December 31, 2009. At that time, the balance in the account was \$138,390.72, and Wife was awarded \$89,954.00 of the balance. Husband asserts that the trial court erred in calculating Wife's 65% from the balance on December 31, 2009 instead of the \$89,863.17 balance on January 1, 2009. Husband made \$18,368.44 in contributions in 2009 after the petition for dissolution was filed thereby increasing the total account value by \$48,527.55 for the 2009 fiscal year.

Although the trial court used the account balance as of December 31, 2009 in calculating the marital estate, we find this not to be error. Husband's designated share of account (\$48,436.72) includes all contributions made by him after closing of estate (\$18,368.44).

## V. Attorney Fees

Lastly, Husband argues that the award of attorney fees is not supported by the evidence and is an abuse of discretion. The trial court has wide discretion in awarding attorney fees and may look at the responsibility of the parties in incurring the fees. *Mitchell v. Mitchell*, 875 N.E.2d 320, 325 (Ind. Ct. App. 2007). We apply the abuse of discretion standard in reviewing such an award. *Gillette v. Gillette*, 835 N.E.2d 556, 561 (Ind. Ct. App. 2005). In determining whether to award attorney fees in a family law matter, the court must consider the parties' resources, economic condition, ability to engage in gainful employment, and other factors that bear on the award's reasonableness. *Bean v. Bean*, 902 N.E.2d 256, 266 (Ind. Ct. App. 2009).

The trial court awarded Wife attorney fees in the amount of \$11,976.50, which is the amount set forth on Wife's counsel's affidavit plus \$1,000 for additional expenses in preparation for and attending the final hearing. *Appellant's App.* at 18. Husband disputes the reasonableness and accuracy of the fees as requested in the affidavit submitted by Wife's counsel. Husband did not produce any evidence to dispute or contradict Wife's evidence of her incurred attorney fees. Thus, the trial court found the award appropriate based on the parties' disparate income, and the fact that Wife incurred significant fees as a direct result of Husband's repeated noncompliance with discovery and court orders. *Id.*

We find that the trial court did not abuse its discretion in awarding attorney fees to Wife and find the award appropriate in light of Husband's noncompliance and significantly higher income.

Finally, we decline to grant Wife's request for further attorney fees associated with this appeal. Appellate Rule 66(E) provides:

The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution.

An award of damages is discretionary and may be ordered when an appeal is meritless, frivolous, vexatious, done in bad faith, or for purposes of harassment or delay. *Family and Social Services Admin. v. Calvert*, 672 N.E.2d 488, 495 (Ind. Ct. App. 1996). Further, an appellate court may award attorney fees to an appellee if it affirms the judgment on appeal and the appellant's contentions are utterly devoid of all plausibility. *Shively v. Shively*, 680 N.E.2d 877, 883 (Ind. Ct. App. 1997). We find Husband's decision in filing this appeal did not rise to the level necessary to invoke appellate attorney fees, as it was not frivolous or in bad faith.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.