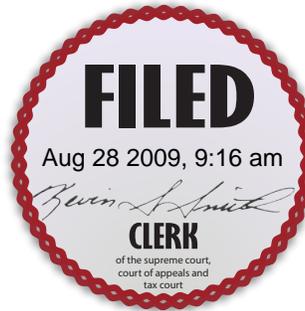


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HENRY E. FAGAN,)
)
Appellant-Respondent,)
)
vs.) No. 71A03-0904-CV-147
)
BRENDA D. FAGAN,)
)
Appellee-Petitioner.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Margot F. Reagan, Judge
Cause No. 71D04-0705-DR-312

August 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Henry E. Fagan (“Husband”) appeals the order dissolving his marriage to Brenda D. Fagan (“Wife”). He argues the trial court erred by: (1) entering a final dissolution decree without conducting a retrial of the final dissolution hearing; (2) awarding Wife one-half of his pension; and (3) entering an order for child support in excess of the amount agreed upon by the parties. Concluding Husband has waived these issues, and otherwise finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY¹

Husband and Wife married in 1990 and have two children, B.F., born September 29, 1990, and R.F., born June 22, 1992. In May 2007, Wife filed for dissolution of the marriage, and the case was assigned to the Honorable William T. Means. On June 5, 2007, the trial court held a hearing during which the parties reached an agreement regarding provisional relief including child support. The parties recited the agreement on the record and thereafter filed a provisional order, which was approved and entered by the trial court.²

Throughout the course of the dissolution proceedings, Husband filed various motions, including a motion in October 2007 to modify child support. The trial court

¹ Husband’s Statement of Facts contains argument and inappropriate commentary questioning the truthfulness of some of the testimony in the record. We remind counsel that the Statement of Facts section “shall describe the facts relevant to the issues presented for review,” is to be a narrative statement of facts, and is not to be argumentative. Ind. Appellate Rule 46(A)(6); *Parks v. Madison County*, 783 N.E.2d 711, 717 (Ind. Ct. App. 2002), *trans. denied*.

² Husband raises issues relating to the amount of provisional child support agreed to by the parties, but he neither included a copy of the provisional order in his Appellant’s Appendix nor requested a copy of the transcript from the June 5, 2007 hearing.

held a hearing on this and other motions and instructed Husband to calculate and submit a modified child support worksheet. The record before us on appeal does not indicate Husband did so, but in May 2008 he did file an additional motion to modify child support.

On July 29, 2008, Judge Means held a final dissolution hearing. At the end of the hearing, Judge Means reserved his ruling, instructed the parties to submit letters with their requested relief, and informed them that he would make a decision before he retired at the end of September. Husband and Wife submitted their post-trial letters at the end of August 2008.³

When Judge Means retired, he had not entered a final dissolution order.⁴ In November 2008, Wife filed a request for a status hearing and a petition for rule to show cause.

The Honorable Margot F. Reagan was assigned to the case, and on November 18, 2008, she held a hearing on Wife's motions. During this hearing, Judge Reagan discussed how she would proceed with entering a final dissolution order. She indicated she would review the final hearing transcript and would not reconduct a final dissolution hearing, which would be costly to Husband and Wife. Husband's counsel initially indicated he preferred a rehearing of the final dissolution hearing; he stated that it might be "simpler just to have the trial all over again" due to the various issues involved, such

³ Husband did not include either party's post-trial letter in his Appellant's Appendix.

⁴ The parties both indicate that Judge Means became ill prior to his retirement.

as the payment on Wife's school bus and unpaid car and health insurance. (Nov. 18, 2008 Tr. at 7.) He then stated "but whatever." (*Id.* at 9.) When Judge Reagan asked if there might be a need for supplemental testimony if all the issues were not covered in the final hearing transcript, Husband's counsel responded, "I guess we could either do it by testimony or by, you know, brief, something like that." (*Id.* at 10.) On two other occasions, Judge Reagan indicated she would review the transcript of the final hearing and not conduct a rehearing. Husband did not object to such procedure and instead indicated his agreement.

THE COURT: Well, I'm going to go ahead and read the transcript instead of retrying it. As the -- as to these other issues, I think I would prefer that you both submitted your additional information with any documents that will back that up.

[HUSBAND'S COUNSEL]: Okay.

* * * * *

THE COURT: In the meantime, I'll be looking over the transcript. I know you're anxious to get some ruling on this. You've waited a long time due to the circumstances. But if I can go over that, you can get the rest of your argument in, and then if we need to, we can have another hearing. Hopefully, it's not necessary.

[HUSBAND'S COUNSEL]: That's fine.

(*Id.* at 11-13.) Judge Reagan instructed Husband to file a response to Wife's show cause petition and Wife to file a reply, which the parties did.⁵

⁵ Husband's counsel did not include his show cause response or Wife's reply in his Appellant's Appendix.

On January 9, 2009, Judge Reagan entered a final dissolution decree, which provided in relevant part:

This court has examined the transcript of the final hearing conducted on July 29, 2008 before Judge William Means who has subsequently retired as of September 30, 2008. The exhibits admitted at the final hearing have also been reviewed. The final arguments in letter form submitted by each party were carefully considered. Also, an additional hearing conducted before this judge on November 18, 2008 and supplemental submissions have been considered. As a result, this court consequently makes findings of facts and conclusions detailed herein incorporated into this Decree of Dissolution.

Findings of Fact and Conclusions of Law

1. Indiana law presumes that an equal division of the marital property between the parties is just and reasonable as outlined in I.C. § 31-15-7-5. The presumption may be rebutted by a party through relevant evidence, including evidence concerning factors such as (1) when the property was acquired, (2) economic circumstances of parties, (3) conduct of parties during marriage, (4) contribution to the acquisition of property and (5) earning ability of parties. Id.

2. The marital estate subject to division includes property owned by either spouse prior to the marriage[.] I.C. § 31-15-7-4(a) and I.C. § 31-15-7-5. Husband attempted to rebut the presumption [o]f a 50/50 division of the marital estate in this case. However, his expert could not support Husband's contention that Wife had wrongfully appropriated marital assets during the marriage. Wife's withdrawal or holding back funds of deposits were reasonable for household and children's needs and the expert could not say that failure to account for \$45,000 proves those funds were not used for things other than the marriage.

3. The marriage lasted seventeen years and the length of the marriage can and is taken into account by this court. The Wife stayed home the majority of the time to raise the couple's children and work the couple's farm. Those children will soon be emancipated. There is convincing evidence supporting the equal division of the marital estate.

4. Many of Husband's claims are not credible, for example, his claim that an unmade airplane was worth \$15,000, (contrary to expert Daryl Ball's testimony), or that his Wife was appropriating money from their accounts, or that she stayed home, not to work the farm, but to take care of her disabled son, when in fact she continued to farm for three years after her son's death until the farm was sold. Further, several of this court's orders were disregarded by Husband. His complaints that his Wife didn't want to work were contradicted by her actions when she purchased the school bus, obviously intending to work long-term.

* * * * *

11. Child support will be paid by the Husband in the amount of \$163.00 per week after the Decree of Dissolution is issued by the court and he must also pay any documented arrearage.

* * * * *

17. With regard to Husband's pension of \$2,979.17 per month, the Wife is entitled to one-half of the monthly payment until Husband's death based upon the length of the marriage, his request that she forego benefits after his death so they could receive higher benefits and her inability to accumulate a pension because she stayed home to work the farm from which Husband benefited. These benefits are a marital asset pursuant to I.C. [§] 31-9-2-98.

(Appellant's App. at 7-9.)

DISCUSSION AND DECISION

Husband argues the trial court erred by: (1) entering a final dissolution decree after reviewing the transcript instead of conducting a rehearing; (2) awarding Wife one-half of his pension; and (3) entering an order for child support in excess of the amount agreed upon by the parties.

1. Rehearing

Husband has waived review of his argument that Judge Reagan erred by entering the dissolution decree without holding a new dissolution hearing. In order to preserve for review a claim that the trial court erred, a specific and timely objection must be made.

See Shady v. Shady, 858 N.E.2d 128, 138 (Ind. Ct. App. 2006), *trans. denied*. Although Husband initially stated that it might be easier for Judge Reagan to conduct a dissolution rehearing, he never objected to Judge Reagan's decision to review the transcript from July 29, 2008 hearing. Instead, he indicated his agreement. Accordingly, Husband has waived any claim of error on this issue. *See id.*; *see also Farner v. Farner*, 480 N.E.2d 251, 257-58 (Ind. Ct. App. 1985) (explaining that in a case where evidence is heard by a trial judge who thereafter dies or resigns from office before making findings or ruling on the evidence, the general rule is that a successor judge may not make findings of fact or conclusions of law without a trial de novo; *however*, a party may waive right to a determination of the issues by the judge that heard the evidence and the parties may stipulate that the successor judge determine the case on the record); *Henderson v. State*, 647 N.E.2d 7, 10 (Ind. Ct. App. 1995) ("When no objection has been timely raised in the proceeding, any objection to the special judge's authority is deemed waived"), *reh'g denied, trans. denied*.

2. Pension

Husband next argues the trial court erred by awarding Wife one-half of his pension and suggests the trial court divided this asset based on its belief of Wife's testimony instead of Husband's testimony regarding the reason Wife stayed home.

The disposition of marital assets is within the sound discretion of the trial court. *Hill v. Hill*, 863 N.E.2d 456, 462 (Ind. Ct. App. 2007). However, Husband has waived this allegation of error because he makes no cogent argument or citation to authority.

Each argument must contain the appellant's contentions supported by cogent reasoning, citation to authority and to the Record, the applicable standard of review and a brief statement of the procedural and substantive facts necessary for consideration of the issue. Ind. Appellate Rule 46(A)(8)(a),(b). Because Husband did not comply with Indiana Appellate Rule 46(A)(8), he has waived any argument regarding division of his pension. *See Worman Enterprises, Inc. v. Boone County Solid Waste Management Dist.*, 805 N.E.2d 369, 379 (Ind. 2004) (concluding appellant waived argument where it failed to elaborate on argument).⁶

3. Child Support

Husband argues the trial court erred by ordering him to pay \$163.00 per week in child support because the “parties agreed to the entry of an Order of child support of \$150.00 per week (Trial Tr. 27-3).” (Appellant’s Br. at 8.) Page twenty-seven of the Trial Transcript, however, contains no such agreement. Husband did not submit a child support worksheet to the trial court during the final dissolution hearing, and he makes no cogent argument and provides no citation to authority in support of his allegation the child support order was erroneous. Therefore, he has waived review of his allegation of error regarding child support. *See* Ind. Appellate Rule 46(A)(8); *Worman*, 805 N.E.2d at

⁶ Notwithstanding Husband’s waiver, we cannot say the trial court abused its discretion in its division of the pension. *See Hill*, 863 N.E.2d at 461-62 (holding that husband’s pension was properly included in the marital pot and that the trial court did not err by awarding wife half of the pension). To the extent Husband asserts the trial court erred because it accepted Wife’s testimony over his on issues relating to the division of his pension, we remind counsel that we neither reweigh evidence nor judge witnesses’ credibility. *See Shady*, 858 N.E.2d at 140-41.

379; *see also Butterfield v. Constantine*, 864 N.E.2d 414, 417 (Ind. Ct. App. 2007) (explaining husband had waived right to appeal trial court's order regarding post-secondary expenses where he had, among other things, failed to produce a worksheet).⁷

Affirmed.

CRONE, J., and BROWN, J., concur.

⁷ Husband also suggests the trial court erred because it failed to address his motion to modify the amount of child support contained in the provisional order and whether the provisional order's requirement that he pay \$268.00 in child support was erroneous. In support, Husband asserts he "filed a Motion to Modify Support on May 23, 2008, which was to be addressed at the Final Hearing, and never was by Judge Reagan." (Appellant's Br. at 8.) However Husband provided no citation to the record to support his filing of a motion to modify or his providing notice to Judge Reagan that this issue was still pending. Neither had he provided any citation to the record to support there being an underlying error in the provisional child support order. For all these reasons, this allegation of error is also waived. *See* App. R. 46(A)(8).