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IN THE
COURT OF APPEALS OF INDIANA

MARC K. BERGMAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 48A05-1012-DR-814
	)	
CYNTHIA BERGMAN,	)	
	)	
Appellee.	)	

APPEAL FROM THE MADISON SUPERIOR COURT, DIVISION I
The Honorable Dennis Carroll, Judge
Cause No. 48D01-0808-DR-1489

October 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Mark Bergman ("Husband") and Cynthia Bergman's ("Wife") marriage was dissolved in Madison Superior Court. Husband appeals the trial court's dissolution decree arguing that the court abused its discretion when it ordered him to pay spousal maintenance to Wife and her appellate attorney fees.

We affirm.

Facts and Procedural History

Husband and Wife were married in 1996, but had lived together for several years prior to their marriage. During the marriage, Wife applied for and began receiving social security disability benefits. Wife suffers from back pain, panic attacks, and depression. Wife has also attempted to commit suicide on more than one occasion. Wife is generally unable to maintain employment for more than a few months at a time.

In 2008, Wife petitioned for dissolution of marriage. On September 29, 2010, the trial court entered a decree dissolving the parties' marriage. The decree provides in pertinent part:

> 4. The HUSBAND has earned between $60,000 and $70,000 per year for the last several years working at Pendleton Correctional Facility and part time for the post office.
>
> 5. The WIFE has been disabled for the last several years and receives social security disability in the amount of $574.00 per month. She also receives Medicaid through her disability at a cost of $32.00 per month, but this does not include prescriptions.
>
> 6. WIFE has been receiving $139.00 per month in food stamps.
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> 7. The evidence shows, and is not disputed, that HUSBAND participated in and assisted WIFE with the application process for disability. He also drove her to appointments and provided information regarding the extent of her disability in order for her to qualify for social security.

> 8. At the direction of the court WIFE did go to Indiana Vocational Rehabilitation for an appointment but the organization did not provide any type of psychological testing or vocational testing. No job opportunities or prospects were provided to WIFE as a result of this interview.
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> ***
>
> 20. That during the marriage WIFE attempted to work several different jobs and was fired from every one. This appears to be from her lack of ability to learn, understand and retain information and maintain on the job skills necessary to sustain employment. In addition, the WIFE suffers from serious and debilitating bouts of depression.

Appellant's App. pp. 67-69.

The trial court concluded that Wife's "ability to support herself is materially impacted by her disability, and because her monthly social security is the minimal amount of $574" ordered Husband to pay maintenance in the amount of $130 per week. Id. at 70. Thereafter, Husband filed a motion to correct error, which the trial court denied. Husband now appeals. Additional facts will be provided as necessary.

I. Spousal Maintenance

Husband argues that the trial court abused its discretion when it awarded incapacity maintenance to Wife because Wife was awarded marital property sufficient to provide for her needs, and she failed to present any medical or expert testimony to support her claim of incapacity. An award of spousal maintenance is within a trial court's sound discretion, and we will reverse only when the decision is clearly against the logic and effect of the facts and circumstances of the case. Augspurger v. Hudson, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004). In determining whether the trial court has abused its discretion in making its spousal maintenance determination, we presume that the trial

court properly considered the applicable statutory factors in reaching its decision. Bizik v. Bizik, 753 N.E.2d 763, 769 (Ind. Ct. App. 2001), trans. denied. Our task is limited to determining whether there is sufficient evidence to support the trial court's judgment. Moore v. Moore, 695 N.E.2d 1004, 1008 (Ind. Ct. App. 1998).

Claims for maintenance due to incapacity are governed by Indiana Code section 31-15-7-2(1) (2008), which provides:

> If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court may find that maintenance for the spouse is necessary during the period of incapacity, subject to further order of the court.

Claims for "incapacity maintenance must be evaluated by giving a strict if not literal interpretation to the language of the statute." Cannon v. Cannon, 758 N.E.2d 524, 526 (Ind. 2001).

To award maintenance, the trial court must make a threshold determination that (1) the spouse is physically or mentally incapacitated, and (2) that the incapacity materially affects the spouse's self-supportive ability. Bizik, 753 N.E.2d at 769. "And, although the language of the statute appears to give the trial court some discretion not to award maintenance even where it makes such finding, . . . the strict construction principles applicable in this area narrowly limit that discretion as well." Cannon, 758 N.E.2d at 526. "Where a trial court finds that a spouse is physically or mentally incapacitated to the extent that the ability of that spouse to support himself or herself is materially affected, the trial court should normally award incapacity maintenance in the

absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance." Id. at 527.

Here, the trial court entered findings of fact from which it concluded Wife was entitled to maintenance. When a trial court enters such special findings, we will not set them aside unless they are clearly erroneous and we will give due regard to the trial court's opportunity to judge the credibility of the witnesses. Augspurger, 802 N.E.2d at 508-09. The findings are clearly erroneous if the record is devoid of facts or inferences to support them, or if they do not support the judgment. Id. at 509. Moreover, we do not reweigh the evidence or reassess the credibility of witnesses. Id.

There is evidence in the record that would support the inference that Wife is not completely incapable of working. Wife has been employed in the past but was fired from those jobs shortly after she was hired. The longest period of time Wife was able to maintain employment was approximately ten months at Pizza Hut.

Wife attended special education classes while in school and completed only the 10th grade. Wife obtained her GED, but only after taking the exam four or five times. As ordered by the court, Wife met with a vocational rehabilitation counselor, but was never contacted by that office after the appointment. Moreover, the following finding of the trial court is supported by the evidence:

> [D]uring the marriage WIFE attempted to work several different jobs and was fired from every one. This appears to be from her lack of ability to learn, understand and retain information and maintain on the job skills necessary to sustain employment.

Appellant's App. p. 69.

The record further indicates that Wife suffers from panic attacks and depression, and she has attempted to commit suicide on multiple occasions. She also suffers from back pain from herniated discs in her neck and lower back. Wife stated that she can only sit for 15 to 20 minutes at a time and that it hurts to walk up stairs.

During the marriage, Wife successfully applied for social security disability benefits, and the parties used those benefits to pay household bills. Husband also provided assistance to Wife in applying for social security benefits.

Finally, we observe that the only post-dissolution assets at Wife's disposal are her truck, valued at $8000, personal property with a minimal value, Husband's 457 retirement plan valued at $59,735, and her monthly disability income in the amount of $574. In contrast, Husband earns $60,000 to $70,000 per year, and he was awarded his pension valued at over $50,000, his truck, personal property, and the marital residence.

Under these facts and circumstances, we cannot conclude that the trial court abused its broad discretion when it determined that Wife's ability to support herself was "materially affected." See I.C. § 31-15-7-2(1); Cf. Paxton v. Paxton, 420 N.E.2d 1346, 1348 (Ind. Ct. App. 1981) (holding that medical testimony was not required to support an award of maintenance where wife testified that she was receiving social security disability and was unable to maintain employment due to her disability). We therefore affirm the trial court's order awarding incapacity maintenance to Wife.

II. Appellate Attorney Fees

Under Indiana Code section 31-15-10-1(a), a trial court is authorized in dissolution proceedings to order a party to pay the other party's reasonable attorney fees, including

an award of appellate attorney fees. Bertholet v. Bertholet, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000). The legislative purpose of this statute is to provide access to an attorney to a party in a dissolution proceeding who would not otherwise be able to afford one. Maxwell v. Maxwell, 850 N.E.2d 969, 975 (Ind. Ct. App. 2006), trans. denied. We review a trial court's award of attorney fees in connection with a dissolution decree for an abuse of discretion. Hartley v. Hartley, 862 N.E.2d 274, 286 (Ind. Ct. App. 2007). Factors to consider in making an award of attorney fees include the parties' relative resources, ability to engage in gainful employment, and ability to earn an adequate income. Maxwell, 850 N.E.2d at 975.

Wife filed a Motion for Preliminary Appellate Attorney Fees stating that she expected to incur approximately $2500 to defend Husband's appeal. In the motion, Wife stated that she still owed attorney fees for the dissolution proceedings. Wife indicated that she is unable to pay the attorney fees because of her limited social security income and the fact that Husband has not paid sums owed to Wife under the court's dissolution decree due to his appeal.[1] The trial court granted Wife's motion, and ordered Husband to pay $2000 of Wife's appellate attorney fees.

Husband argues that the trial court was required to hold a hearing on Wife's motion to determine if the parties' economic circumstances had changed since the final dissolution hearing, which was held less than four months after Wife filed her motion. Husband overlooks the fact that the trial court had recently been presented with evidence

[1] Husband filed an objection to Wife's motion and stated that Wife had not received Husband's 457 plan as stated in the dissolution decree because "the QDRO has not yet been completed." Appellant's App. p. 81.

detailing the financial circumstances of the parties, including that Wife was unemployed and disabled. On appeal, Husband argues that it is possible that Wife's economic circumstances had changed, but he did not raise this argument in his objection to Wife's motion. Husband has also never argued that his economic circumstances have changed.

Because Wife is disabled, it is very unlikely that Wife's economic circumstances changed in the few months between the final hearing and the date she filed her motion requesting appellate attorney fees. There is no evidence in the record to support Husband's argument and, in her motion, Wife maintained that she is "totally and completely disabled." Appellant's App. p. 79. At the dissolution hearing, the trial court heard evidence concerning the parties' relative resources, ability to engage in gainful employment, and ability to earn an adequate income. Because Husband did not allege that either his or possibly Wife's economic circumstances changed after the date of the dissolution hearing, we conclude that the trial court was not required to hold an additional hearing to determine whether to award appellate attorney fees to Wife.[2] And on the record before us, we cannot conclude that the trial court abused its discretion when it awarded appellate attorney fees to Wife.

Conclusion

The trial court did not abuse its discretion when it awarded Wife incapacity maintenance and appellate attorney fees.

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[2] The circumstances presented in this appeal are distinguishable from those cases in which our court has reversed an attorney fee award because of the trial court's failure to hold an evidentiary hearing. In those cases, there was a lack of evidence in the record from which the trial court could have considered the parties' relative resources, ability to engage in gainful employment, and ability to earn an adequate income. See e.g. Bertholet, 725 N.E.2d at 501; Barnett, 447 N.E.2d 1172, 1176 (Ind. Ct. App. 1983).

Affirmed.

BAILEY, J., and CRONE, J., concur.