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IN THE
COURT OF APPEALS OF INDIANA

DALE L. HORN,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 25A03-0904-CV-155
	)	
LUCINDA B. HORN,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable Douglas B. Morton, Judge
Cause No. 25C01-0609-DR-352

November 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Dale L. Horn (Dale), appeals the trial court's Decree of Dissolution of Marriage, dissolving his marriage to Appellee-Petitioner, Lucinda B. Horn (Lucinda).

We affirm.

ISSUES

Dale raises five issues on appeal, which we restate as the following three issues:

(1) Whether the trial court abused its discretion when it denied Dale's motion for a continuance after he submitted a psychiatrist's report which stated that he was not competent to aid his counsel in the dissolution proceedings;

(2) Whether the trial court abused its discretion when it divided the marital estate; and

(3) Whether the trial court erred in calculating Dale's child support obligation.

FACTS AND PROCEDURAL HISTORY

Dale and Lucinda were married on November 3, 1998. Both had been in prior marriages; Lucinda had one prior marriage, while Dale had been married three times before. Lucinda had no children and Dale had a daughter who was ten at the time of his marriage to Lucinda. During their marriage, Dale and Lucinda adopted two children from Russia: A.N.H., born on April 28, 1998, and B.S.H., born on October 1, 1998. Both children have learning disabilities and require regular medications. At the time of the adoption application in January of 2000, Dale and Lucinda represented that their marital real estate was valued at

$1,000,000, with Lucinda earning $31,600 as a sales manager for Lazarus and Dale earning $55,000 as a self-employed contractor. The adoption was finalized in September of 2000.

After the adoption, Dale began abusing alcohol and in 2001, he was hospitalized for treatment. During this time, Dale became secretive about his lifestyle and finances. He also started contacting Lucinda at work, resulting in her involuntary termination from two retail positions. After her termination, Dale wanted Lucinda to be a full-time mother and housekeeper. However, Dale stopped paying the household bills and required Lucinda to charge all marital living expenses to credit cards, which totaled over $50,000 at the time of filing the dissolution action. In 2006, Dale sold a tract of real estate, commonly referred to as the pond property and which had been purchased during the marriage. He deposited the proceeds of this sale in a bank account, jointly held by him and his biological daughter.

On September 25, 2006, Lucinda filed her petition for dissolution of marriage. On April 16, 2007, she filed a motion to modify provisional orders, which was heard by the trial court and an order was entered on July 12, 2007. Thereafter, subsequent motions for citations involving discovery problems were heard by the trial court. The court noted that during one of the preliminary hearings Dale appeared to be inebriated. In April of 2008, Dale's family intervened and had him hospitalized at Fairbanks, in Indianapolis, for his alcohol addiction. After his hospitalization, he was transferred to Fairbanks' immediate care facility, LaVerna Lodge.

During Dale's treatment, Dale's father, Gene Horn (Horn), with a power of attorney and in violation of a trial court's order, transferred all Dale's assets, including the marital real

estate, to a revocable trust with Dale as the trustee and Dale's biological daughter as the successor trustee and sole beneficiary. After discovering the deed transfer, Lucinda filed additional provisional orders and moved to join the trust as an additional party, which was granted by the trial court.

On November 14 and 19, 2008, the trial court conducted a final hearing. However, two days prior to this final hearing, Dale, after being discharged from his treatment facility, filed a motion for continuance. In his motion, Dale alleged to be incompetent and unable to aid his attorney. He submitted the deposition of Doctor Dennis K. Rhyne (Dr. Rhyne), the psychiatrist who supervised Dale's alcohol addiction treatment. Dr. Rhyne opined that Dale was not competent to participate in matters with multi-step consequences, including working with his counsel. While Dr. Rhyne has seen some improvement during several months of treatment, he concluded that Dale was at least six months away from being able to participate effectively in his divorce proceedings, if in fact he was improving. After hearing argument on Dale's motion, the trial court denied the continuance.

On December 31, 2008, the trial court entered its findings of fact and conclusions of law. In its Order, the trial court found that Gene

> has a power of attorney for Dale and was handling some of his business (including the treatment). [Gene] was in a position to exert substantial control over Dale and has by word and action expressed a strong desire to favor [the biological daughter] over [the adopted children] (whom he apparently seeks to disinherit).

(Appellant's App. pp. 13-14). Because the assets were transferred without a court order, the trial court concluded the transfer to be fraudulent and set aside the conveyance. The trial

court found that an equal division of the marital estate was warranted and mandated Dale to pay a weekly child support of $111.

Dale now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Before addressing the merits of Dale's arguments, we issue a word of caution to both counsel. The purpose of the appellate rules, especially Indiana Appellate Rule 46, is to aid and expedite review and to relieve the appellate court of the burden of searching the record and briefing the case. Indiana Appellate Rule 46(A)(8) & (B) requires that in the argument section, "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . ." It is well settled that we will not consider an appellant's assertion on appeal when he or she has failed to present cogent argument presented by authority and references to the record, as prescribed by the rules. *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). "If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties." *Id*. We are very hesitant to take on that role.

Here, the argument section of the briefs submitted by both parties falls woefully short of the requirements of Ind. Appellate Rule 46(A)(8)(a). Most of the parties' contentions are mere wild claims, unsupported by any references to established case law. More specifically, out of the five issues raised by Dale, only one is properly and sufficiently supported with authorities. On the other hand, Lucinda's argument, while equally devoid of case law, is also

lacking in references to the appendix. However, because of the significance of the issues presented by the parties, we will attempt to decide the case on its merits despite the parties' noncompliance with the rules of appellate procedure.

I. *Standard of Review*

Dale is appealing from a decision in which the trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial 52. Thus, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Webb v. Webb*, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*. We neither reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Id*.

II. *Motion for Continuance*

First, Dale complains that the trial court abused its discretion when it refused to continue the final hearing. Referencing Dr. Rhyne's report, he asserts that he was mentally unable to aid in his counsel's preparation and presentation of his case.

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *Troyer v. Troyer*, 867 N.E.2d 216, 219 (Ind. Ct. App. 2007). An abuse of discretion may be found in the denial of a motion for continuance when the moving party has shown good cause for granting the cause. *Id*. However, the moving party must be

free from fault and must demonstrate that he or she was prejudiced by the denial. *Danner v. Danner*, 573 N.E.2d 934, 937 (Ind. Ct. App. 1991), *trans. denied*.

Evaluating the facts before us, we cannot conclude that the trial court abused its discretion. Lucinda instigated the current proceedings on September 25, 2006 with the final hearing taking place more than two years later, on November 14 and 19, 2008. During these two years, Dale was only admitted to Fairbanks from April to the beginning of November of 2008. He was represented by the same counsel since the filing of the petition for dissolution.

The record reflects that during initial hearings, Dale, at times, failed to be present for hearings, was unresponsive when testifying, and uncooperative in following the trial court's preliminary orders. In this regard, we note that the trial court held Dale in contempt for not making intermittent payments to Lucinda and for refusing to pay child support. Similarly, the record reflects that whereas the trial court allowed Lucinda and the children to reside in the marital residence until January 2007, Dale made this physically impossible by failing to deliver fuel to the house as he originally had promised and whereas the trial court had restrained Dale from transferring or encumbering assets, all his assets were transferred to a revocable trust. While the final hearing was originally scheduled to take place on July 31, 2008, the trial court continued the hearing at Dale's request because he was mentally unable to testify. Two days prior to the final hearing scheduled for November 14, 2008, Dale submitted Dr. Rhyne's deposition stating that some progress had been made and that he hoped that in six months' time Dale might have recovered sufficiently to enable him to participate adequately in the legal proceedings.

It is clear that the trial court was faced with balancing Dale's need for a well-prepared attorney against the needs for maintaining the court calendar and Lucinda's need to bring finality to a proceeding that had been going on for more than two years and had been delayed numerous times. It is equally clear that Dale is not free from fault in these proceedings, nor did he demonstrate that he was prejudiced by the denial. *See Danner*, 573 N.E.2d at 937. Moreover, at the final hearing, his counsel vigorously cross-examined all witnesses, presented witnesses, and introduced numerous financial records on Dale's behalf. As a result, we find that the trial court did not abuse its discretion by denying Dale's request for a continuance.

III. *Division of Marital Estate*

Next, Dale contends that the trial court abused its discretion when it divided the marital estate. In essence, his arguments are two-fold: (1) the trial court did not equally distribute the marital assets; and (2) the trial court abused its discretion when it failed to include Dale's tax delinquency and real estate taxes in the marital estate.

The disposition of marital assets is within the sound discretion of the trial court. *Bizik v. Bizik*, 753 N.E.2d 762, 766 (Ind. Ct. App. 2001), *trans. denied*. When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. *Id*. In reviewing a trial court's disposition of the marital assets, we focus on what the trial court did, not what it could have done. *Id*. Therefore, when we review a claim that the trial court improperly

divided marital property, we must decide whether the trial court's decision constitutes an abuse of discretion, considering only the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. An abuse of discretion also occurs when the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. *Id*. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. *Id*.

The division of marital property in Indiana is a two-step process. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *reh'g denied, trans. denied*. The trial court must first determine what property must be included in the marital estate. *Id*. Typically included within the marital estate is all the property acquired by the joint effort of the parties. *Id*. After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable. Ind. Code § 31-15-7-5. If the trial court deviates from this presumption, it must state why it did so. *In re Marriage of Lang*, 668 N.E.2d 285, 290 (Ind. Ct. App. 1996). A party who challenges the trial court's division of the marital estate must overcome a presumption that the court considered and complied with the applicable statute. *Frazier v. Frazier*, 737 N.E.2d 1220, 1223 (Ind. Ct. App. 2000). We note that a trial court's discretion in dividing marital property

is to be reviewed by considering the division as a whole, not item by item. *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002).

A. *Distribution of Marital Assets*

On the one hand, Dale complains in his appellate brief that the trial court failed to equally divide the estate, while two pages later, Dale contends that the trial court abused its discretion by not awarding him more than fifty percent of the marital property. Turning to Dale's first claim, he asserts that the trial court did not include a "careful calculation of the net marital estate" and argues that "[i]f the [c]ourt's allocation of the marital estate and the underlying basis to support it cannot be ascertained that is the basis for a remand." (Appellant's Br. p. 15).

While we agree with Dale that the trial court's findings did not include a total combined value of the net marital estate, the trial court's findings do include the underlying numbers necessary to ascertain the value of the net estate. In fact, in the Fact section of his appellate brief, Dale did exactly that. Combing through the trial court's Order, Dale calculated the net value of the property each party was awarded. Combining the value of the assets received by each party resulted in a net marital estate of $1,283,528.

In its Conclusions of Law, the trial court justified its equal division of the marital estate as

> Ultimately, this case is an argument by both sides that the property should not be divided 50-50 but that instead their side should be substantially favored. Lucinda argues based upon Dale's wastage relating to his alcoholism, his dramatically reduced income, and his failure to pay the necessities of life for her and for the children. Dale argues based upon his and his family's providing the quite substantial assets of the parties and Lucinda's lack of income for approximately five years. In the end, the [c]ourt believes these

> arguments substantially offset one another and that a 50-50 property and debt division is appropriate.

(Appellant's App. p. 17).

With the net worth of the marital estate being $1,283,528, Lucinda received net assets worth $738,198 or 57.5% and Dale received assets with a net value of $545,330 or 42.5%. Accordingly, based on these numbers, there is a 7.5% deviation from the equal apportionment of property. We will affirm the trial court's award if it comes close to the attempted apportionment. *See In re Marriage of Pulley*, 652 N.E.2d 528, 531 (Ind. Ct. App. 1995) *trans. denied*. Whether a particular deviation from the attempted apportionment is substantial or not depends upon the size of the marital estate. *Hoskins v. Hoskins*, 611 N.E.2d 178, 180 (Ind. Ct. App. 1993). Here, under the facts of this case, the trial court's property division was sufficiently close to the presumptive 50-50 division, and therefore we do find that the trial court did not abuse its discretion. *See Shannon v. Shannon*, 847 N.E.2d 203 (Ind. Ct. App. 2006), *reh'g denied*, *trans. denied* (2% deviation from attempted 50-50 split of a marital estate with a net value of $102,000 was not an abuse of discretion); *Cox v. Cox*, 580 N.E.2d 344 (Ind. Ct. App. 1991), *trans. denied* (6% deviation from attempted 50-50 split of a marital estate with a net value in excess of $409,000 was insubstantial).[1]

[1] Because we conclude that the trial court properly divide the marital estate in its Order, we do not need to address Dale's assertion that he should have received a portion in excess of a 50-50 division of the net marital estate.

B. *Income Taxes and Real Estate Taxes*

Next, Dale argues that the trial court abused its discretion by not considering his enormous tax debt and the real estate taxes of marital property paid by his parents as a debt of the marriage.

1. *Income Taxes*

With regard to the unpaid income taxes, the record reflects that Dale had not paid taxes between tax year 1992 and tax year 2007. Verga Smith (Smith), the parties' certified public accountant, testified at the final hearing that she had discussed Dale's failure to pay taxes with Lucinda when they got married and had encouraged Lucinda to file her taxes separately. The record indicates that Lucinda had followed this advice and had filed her taxes separately in the years that she had to file income taxes. In its findings, the trial court stated that "Dale faces a six figure liability for income taxes, a situation that has been developing for years. Lucinda filed her own tax returns to avoid civil penalties or criminal responsibility. Dale faces those potential penalties." (Appellant's App. p. 18). The trial court concluded that:

> Lucinda shall be responsible for all of her credit card debts, any debt she has to her mother, and any remaining medical obligation to Woodlawn or to Duke Hospital. Dale shall be responsible for any debts to his parents and his tax obligation to the federal and state governments.

(Appellant's App. p. 20).

Marital property includes both assets and liabilities. *Gard v. Gard*, 825 N.E.2d 907, 910 (Ind. Ct. App. 2005). In a dissolution proceeding, the trial court is mandated, by statute and case law, to divide the assets and liabilities of the parties to the proceeding in which they

have a vested present interest. *In re Marriage of Lay*, 512 N.E.2d 1120, 1123-24 (Ind. Ct. App. 1987). Generally, the marital estate closes on the date the dissolution petition was filed, and debts incurred by one party after that point are not to be included in the marital estate. *In re the Marriage of Moore*, 695 N.E.2d 1004, 1009 (Ind. Ct. App. 1998). However, the trial court may not divide assets which do not exist just as it may not divide liabilities which do not exist. *In re Marriage of Lay*, 512 N.E.2d at 1123-24.

We have previously held that

> Any party who fails to introduce evidence as to the specific value of the marital property at the dissolution hearing is stopped from appealing the distribution on the ground of trial court abuse of discretion based on that absence of evidence. This rule places the burden of producing evidence as to the value of the marital property where it belongs on the parties, rather than on the trial court. It is appropriate to require the parties to bear the burden of gathering and presenting to the trial court evidence as to the value of the marital property rather than to place upon the trial court the risk of reversal if it distributes the marital property without specific evidence of value. . . . In sum, we do no more than place the burden of producing evidence as to the value of the marital property squarely where it belongs on the shoulders of the parties and their attorneys. After all, the general rule is that parties to a legal proceeding are bound by the evidence they produce at trial and they are not allowed a second chance if they fail to introduce crucial evidence. We see no reason to make dissolution proceedings an exception to this rule.

Perkins v. Harding, 836 N.E.2d 295, 301-02 (Ind. Ct. App. 2005) (quoting *In re Marriage of Church*, 424 N.E.2d 1078, 1081-82 (Ind. Ct. App. 1981)).

Here, although the record before us includes a wealth of references to Dale's extensive debt to the IRS, none of these provide us with a firm calculation of his actual liability. Responding to Lucinda's counsel's question whether the sanctions and penalties imposed by the IRS for nonfiling could exceed $200,000, Smith testified:

> [SMITH]: The tax and penalty and interest I would expect to be in excess of two thousand.
>
> [LUCINDA'S COUNSEL]: And . . . and that's a guesstimate on your part?
>
> [SMITH]: That's definitely a guesstimate on my part.

(Transcript pp. 230-31). Accordingly, in light of the state of the record before us, we find no error attributable to the trial court. *See, e.g., In re Marriage of Larking*, 462 N.E.2d 1338, 1344 (Ind. Ct. App. 1984) (finding no abuse of discretion in trial court's division of assets when parties had failed to provide evidence of the value of some assets at trial).

2. *Real Estate Taxes*

Next, Dale contends that the trial court erred by not allocating real estate taxes as a debt of the marriage. In support of his allegation, Dale generally refers us to a list of expenses which were paid by his parents in 2008. This exhibit contains a generic list of all charges Dale's parents purportedly paid on behalf of their son in 2008. It mentions the payment date, name of payee, amount paid, and check number but fails to include any supporting documents. Without any further particulars, we cannot discern which entrees in this exhibit indicate the payment of real estate taxes. As a consequence, we conclude that Dale waived this argument for our review. *See* App. R. 46(A)(8)(a).

IV. *Child Support Obligation*

Lastly, Dale disputes the trial court's calculation of his child support obligation. The standard of review for child support awards is well settled. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). We begin with the understanding that support calculations are made utilizing the income shares model set forth in the Indiana Child Support Guidelines.

Id. These Guidelines apportion the cost of supporting children between the parents according to their means. *Id*. A calculation of child support under the Guidelines is presumed to be valid. *Id*. Therefore, we will not reverse a support order unless the determination is clearly against the logic and effect of the facts and circumstances. *Id*. When reviewing a child support order, we do not revisit weight and credibility issues but confine our review to the evidence while reasonable inferences favorable to the judgment are considered. *Id*.

In essence, Dale contends that the trial court erred in calculating his weekly adjusted income for child support purposes at $500 per week. In support of his argument, Dale refers to the trial court's finding 23 which states that "Dale filed his tax return for 2007 which shows taxable interest $2,830, Timber Sale $1,650, Business income $1,824 and Real Estate rental $2,041, totaling $24,735." (Appellant's App. p. 16). At first glance, we would agree with Dale that the trial court's itemization of Dale's income does not amount to a grand total of $24,735.

However, upon review of Dale's 2007 Individual Income Tax Return, we believe that the trial court made a scrivener's error, which does not mandate reversal. The Tax Return reflects

Taxable Interest	2,830
Business Interest	18,214
Capital Gain/Loss (Timber Sale)	1,650
Rental Real Estate	2,041
Total Income	24,735

(Respondent's Exhibit EE). Thus, the Tax Return clearly establishes that the trial court's "business income $1,824" in finding 23, should have read "$18,214." Based on these numbers, the trial court did not err in calculating Dale's adjusted weekly income as $500.[2]

CONCLUSION

Based on the foregoing, we find that (1) the trial court did not abuse its discretion by denying Dale's motion for a continuance; (2) the trial court properly divided the marital estate; and (3) the trial court properly calculated Dale's child support obligation.

Affirmed.

FRIEDLANDER, J., concurs.

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

[2] In so far as Dale now presents an argument to receive spousal maintenance, we find his claim waived as he failed to present this argument before the trial court. *See United Farm Bureau Mut. Ins. Co. v. Lowe*, 583 N.E.2d 164, 168 (Ind. Ct. App. 1991), *trans. denied*.

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Appellee-Petitioner.	)	

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

I agree with my colleagues' determination that the trial court properly denied the motion for continuance and correctly calculated Dale's support obligation. However, I part ways with the conclusion that the trial court did not abuse its discretion in dividing the marital estate.

The majority points out that the trial court specifically determined that a "50-50 property and debt division is appropriate." Appellant's App. p. 17. Although the trial court found that the value of the net worth of the marital estate was $1,283,528, Lucinda received 57.5% of the property, and Dale was awarded 42.5% of the estate. Thus, there was a 7.5% deviation from the equal apportionment of the property. Slip op. at 11.

I do not quarrel with the notion that we will affirm the trial court's award in dividing the property if it comes close to the attempted apportionment. In re Marriage of Pulley, 652 N.E.2d 528, 531 (Ind. Ct. App. 1995). Moreover, I agree with the majority's view that whether a particular deviation from the attempted apportionment is substantial depends upon the size of the marital estate. Hoskins v. Hoskins, 611 N.E.2d 178, 180 (Ind. Ct. App. 1993).

Here, the 7.5% deviation of a marital estate amounts to a $90,000 difference. I cannot agree that this sizeable discrepancy was insubstantial and "sufficiently close" to the presumptive 50-50 division of the property. Slip op. at 11. As a result, I would remand this case with instructions that the trial court effect an equal division of the marital property as set forth in the dissolution decree.