

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.

ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

MICHAEL O. BOLINGER
Kokomo, Indiana

DAN J. MAY
Kokomo, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JERRY FITCHPATRICK,)
Appellant/Cross-Appellee-Respondent,)
)
vs.)
)
CATHY FITCHPATRICK,)
Appellee/Cross-Appellant-Petitioner,)

No. 34A04-0706-CV-342

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Daniel C. Banina, Special Judge
Cause No. 34D02-0605-DR-505

October 24, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Cross-Appellee-Respondent Jerry Fitchpatrick appeals the trial court's judgment, awarding his former spouse, Cathy Fitchpatrick, spousal maintenance payments in the amount of \$150.00 per week for the duration of her disability to the extent that it affects her ability to support herself, or until further order of the court.

Jerry raises two issues on appeal, specifically that the trial court abused its discretion by ordering that he pay maintenance to his former wife, and if not, that the court abused its discretion in determining the amount of these maintenance payments. In turn, Cathy responds by claiming Jerry waived his appeal to the spousal maintenance award, and alternatively that the award was not an abuse of discretion. Cathy claims on cross appeal that the trial court abused its discretion by denying her claim of entitlement to COBRA insurance¹ to be funded by Jerry. Cathy further claims that the decree of dissolution entered by the Judge William C. Menges on May 10, 2006, should be struck from the record in this appeal and that she is entitled to appellate attorney fees pursuant to Indiana Appellate Rule 66(E).

Concluding that the trial court did not abuse its discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

Jerry and Cathy were married on March 31, 1993. After approximately ten years of marriage, Cathy petitioned for dissolution of the marriage on April 17, 2003. The

¹ Although the parties do not specify in the record, it appears that COBRA, which stands for Consolidated Omnibus Reconciliation Act, grants certain former employees, retirees, spouses and dependant children the right to a temporary continuation of health coverage in limited situations. *See* COBRA Insurance.com – Information, www.cobrainsurance.com/COBRA_Law.htm. We note that Cathy has provided no evidence suggesting that she would even qualify for insurance coverage under COBRA, but as this is not the focus of this appeal, we need not make a determination on this point.

matter was set for a final hearing on October 19, 2004, at which time the trial court bifurcated the proceedings and entered an agreed order for permanent maintenance payments in the amount of \$150.00 per week to be paid to Cathy, based upon her disability and her inability to work. The trial court ordered the parties to mediate the remaining issues. Mediation, however, was unsuccessful, and the matter was submitted to and taken under advisement by the Judge Menges on January 3, 2006. On May 9, 2006, Cathy filed a Motion to Withdraw Submission, which the Clerk of the Howard County Courts certified that day to the Indiana Supreme Court because the trial court had failed to rule on the matter within the prescribed time limit of Indiana Trial Rule 53.3. On May 23, 2006, the Indiana Supreme Court issued an order withdrawing the matter from Judge Menges's jurisdiction and appointing a special judge to preside over the matter. On May 10, 2006, Judge Menges entered a post-withdrawal judgment and decree, which was later struck from the record by a May 30, 2006 order of the trial court.

The trial court conducted a final hearing on January 17, 2007. Cathy requested that the trial court prepare written findings of facts and conclusions of law. On March 6, 2007, the trial court entered a Decree of Dissolution which, in relevant part, included the following factual findings and legal conclusions:

Findings of Fact

2. The parties were married on March 31, 1993. There has been an irretrievable breakdown of the marriage exists [sic], and that more than sixty (60) days has elapsed since the filing of the Petition for Dissolution of Marriage on April 17, 2003.

....

4. There are no children born to the marriage for which an order is required.

5. The Wife is disabled within the meaning of the Dissolution of Marriage Act and this Court entered a final order on 10/19/04 finding and ordering that the Wife was entitled to permanent maintenance of \$150.00 per week until further order of the Court which findings and order are incorporated herein.

....

8. The Husband has a vested pension benefit with Daimler Chrysler with 30 years of service as of July 2006, 10 years of which was acquired through the joint efforts of the parties, March 31, 1993 to April 17, 2003.

9. CATHY A. FITCHPATRICK has been determined by the federal government, Social Security Administration to be disabled and unable to engage in substantial work activity and currently draws the sum of \$1202.00 per month less \$66.60 for Medicare Premiums for a net of \$1135.00 per month SSDI benefits for her disability.

10. The Court ordered CATHY A. FITCHPATRICK examined by the physician of the Respondent's choice, Donald L. Roegner, M.D. and his report has been filed with the Court. Pursuant to the findings of Dr. Roegner, CATHY A. FITCHPATRICK "is in no position, despite multiple medications and regular treatment to be expected to work, even in the most mundane of jobs such as clerking in a convenience store, etc."

11. The Husband is employed at Daimler Chrysler earning in excess of \$26.00 per hour, approximately \$1180.00 gross wages per week for a 40 hour work week.

12. The Husband has adopted M-Plan as the family health care plan and the Wife's \$1400.00 per month medications current cost \$10.00 co-pay, \$50.00 per month.

13. The Wife's Medicare prescription plan would pay approximately 2 months of the \$1400.00 monthly prescriptions costs of the Wife without M-Plan.

14. The Wife's monthly prescriptions costs of the Wife without M-Plan would exceed her monthly income.

Conclusions of Law

A. The marriage is irretrievably broken and should be dissolved.

....

G. There has been no change of circumstances since the entry of the 10-19-2004 order of permanent maintenance.

H. CATHY A. FITCHPATRICK is entitled to permanent maintenance pursuant to I.C. 31-15-7-2 in that she is physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected.

I. The current order of \$150.00 weekly maintenance is appropriate under the circumstances in that there has been no material change of circumstances since 10-19-04 justifying modification of the weekly order entered “by agreement” and may not be modified. *Haville v. Haville*, 787 N.E.2d 410, 417 (Ind. Ct. App. 2003), *Voigt v. Voigt*, 670 N.E.2d 1271, 1277 (Ind. 1996).

J. The (court) denies the Wife’s request to have the Husband pay her COBRA Insurance and maintain her on his insurance. The Court finds that the Husband is Guardian for four (4) children and such requirement would create an unreasonable burden upon him.

Jerry filed a motion to correct error on March 19, 2007, which was denied by the trial court on May 23, 2007. This appeal follows.

DECISION AND DISCUSSION

I. Standard of Review

The trial court may make an award of spousal maintenance upon the finding that a spouse’s self-supporting ability is materially impaired. *Bizik v. Bizik*, 753 N.E.2d 762, 768 (Ind. Ct. App. 2001) (citing *Fuehrer v. Fuehrer*, 651 N.E.2d 1171, 1173 (Ind. Ct. App. 1995)). The trial court’s power to make an award of maintenance is wholly within its discretion, and we will reverse only when the court has abused its discretion, meaning that the decision is clearly against the logic and effect of the facts and circumstances of the case. *See Augspurger v. Hudson*, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004); *Lowes v. Lowes*, 650 N.E.2d 1171, 1174 (Ind. Ct. App. 1995). An abuse of discretion will also be found when the trial court has misinterpreted the law or when the trial court disregards evidence of factors listed in the controlling statutes. *Lowes*, 650 N.E.2d at 1174.

In this case, the trial court, pursuant to Cathy’s request, entered findings of fact, from which it concluded that Cathy was entitled to permanent spousal maintenance.

Where, as in this case, a trial court enters findings of facts and conclusions thereon, we apply a two-tiered standard of review. *Anthony v. Ind. Farmers Mut. Ins. Group*, 846 N.E.2d 248, 252 (Ind. Ct. App. 2006). We first must determine whether the evidence supports the findings and then must determine whether the findings support the judgment. *Id.* We will reverse the judgment only when it is clearly erroneous. *Id.* We neither reweigh the evidence nor reassess the credibility of the witnesses. *Augsburger*, 802 N.E.2d at 509.

II. Award of Spousal Maintenance

A. Waiver of Right to Appeal

In the instant matter, the trial court bifurcated the proceedings and issued a preliminary Order of Permanent Maintenance on October 19, 2004. The trial court later issued a final Decree of Dissolution, into which it incorporated the October 19, 2004 Order of Permanent Maintenance. Cathy claims that Jerry waived his right to appeal the award of permanent maintenance because he failed to timely file his appeal. We disagree.

“Bifurcation is a process created by statute that allows a trial judge to complete a dissolution in two separate phases.” *Bass v. Bass*, 779 N.E.2d 582, 591-92 (Ind. Ct. App. 2002), *trans. denied*; *Beard v. Beard*, 758 N.E.2d 1019, 1023 (Ind. Ct. App. 2001). “A dissolution action is not complete until the second phase is finished and a final decree is entered.” *Bass*, 779 N.E.2d at 592. Once a trial court bifurcates a trial, the court may issue provisional orders, which are valid, binding orders upon which the parties may rely in conducting their affairs. *Beard*, 758 N.E.2d at 1023. However, these provisional

orders terminate when the final decree is entered. *Bass*, 779 N.E.2d at 592. The trial court's entry of a final decree invokes the parties' right to appeal. *See id.*

In *Bass*, the trial court, pursuant to the requests of the parties, bifurcated the proceedings and entered certain preliminary orders that remained in effect until the parties' dissolution was final. Upon appeal, this court concluded that "the dissolution action was not final until the trial court entered the appealable final decree on May 7, 2001, and the preliminary order remained in effect until that date." *Bass*, 779 N.E.2d at 592. Likewise, in the instant matter the trial court bifurcated the proceedings and entered an order for permanent spousal maintenance on October 19, 2004. This order was not a final appealable order, but rather was a preliminary order that remained in effect until the trial court issued a final appealable order, the Decree of Dissolution, on March 6, 2007. We therefore conclude that Jerry did not waive his right to appeal the trial court's decree ordering him to pay Cathy permanent spousal maintenance, because the October 19, 2004 Order was not a final appealable order, but rather a preliminary one. This matter would not have been appealable until the trial court entered its final decree on March 6, 2007. Therefore, Jerry's appeal was timely.

B. Availability and Amount of Maintenance

Under Indiana law, a trial court may award spousal maintenance if the court finds a spouse to be physically or mentally incapacitated to the extent that the incapacitation materially affects the ability of the spouse to support himself or herself during the period of incapacity, subject to further order of the trial court. Ind. Code § 31-15-7-2(1) (2002). An award of maintenance may be challenged, whether it was based upon a decree of the

court or an agreement of the parties. *See Lowes*, 650 N.E.2d at 1174. The burden is on the party challenging the order of modification to show a substantial change in the circumstances as to make the awarded maintenance unreasonable. *See id.* In determining whether a substantial change of the circumstances has occurred which renders the award of maintenance unreasonable, the court should consider the underlying factors necessitating the award. *See id.* Those factors include the financial resources of the party seeking the maintenance, the standard of living established during the marriage, the duration of the marriage, and the ability of the spouse from whom the maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance. *See id.*

Jerry first argues that the trial court abused its discretion by awarding spousal maintenance payments to Cathy for the duration of her disability by claiming that Cathy is not truly disabled and is fabricating her mental instability. We find Jerry's argument unpersuasive, however, because he makes only bare accusations to this effect and points to no evidence supporting his argument. In fact, the only evidence presented by either party pertaining to Cathy's alleged disability supports the trial court's finding that Cathy was disabled. Testimony of the parties and a report completed by Jerry's expert witnesses demonstrated that Cathy had been adjudged to be disabled by the Social Security Administration and further that both the psychiatrist and the psychologist chosen by Jerry to evaluate Cathy concluded that Cathy was likely suffering from Schizo-Affective/Bipolar Disorder such that she was in no position to be expected to work. Jerry's claims are unsupported by the record and essentially present an invitation to

reweigh the evidence, which we decline. As we review this evidence in the light most favorable to the trial court's judgment, we conclude that the trial court did not abuse its discretion by ordering that Jerry pay spousal maintenance payments to Cathy for the duration of her disability.

Jerry argues further that even if the trial court did not abuse its discretion by awarding spousal maintenance payments to Cathy, it nevertheless abused its discretion in determining the amount of these payments. Again we find this argument unpersuasive. Jerry argued before the trial court that his financial resources were limited, despite the fact that he was gainfully employed earning roughly \$26.00 an hour and received somewhere between \$225.00 and \$298.00 per month from the TANF fund² to assist with the financial burden associated with his guardianship of his four grandchildren. Jerry claimed that he did not have the financial resources to satisfy an ongoing obligation of weekly spousal maintenance payments in the amount of \$150.00 because he had become subject to frequent "layoffs" at work, was not guaranteed a full forty hour work week, did not have the opportunity to work overtime, and because he carried the burden of providing for his four grandchildren with no assistance coming from the children's mother or fathers. The trial court was aware of Jerry's financial situation as well as his financial obligation to provide for his grandchildren, but nevertheless found that he was capable of paying weekly maintenance payments of \$150.00. Further, Jerry presented no evidence that either his or Cathy's financial situation had changed significantly so as to

² Although not specified by the parties TANF appears to stand for the Temporary Assistance for Needy Family fund.

make continued payments unnecessary. After reviewing the evidence in a light most favorable to the trial court's judgment, we conclude that the trial court did not abuse its discretion in ordering Jerry to pay \$150.00 per week to Cathy in spousal maintenance payments for the duration of her mental disability to the extent that her disability materially affects her ability to support herself.

III. Denial of COBRA Insurance Coverage³

Cathy cross-appeals, claiming the trial court abused its discretion by denying her claim of entitlement to COBRA insurance, to be funded by Jerry as a part of the maintenance order. We disagree. Before issuing its final Decree of Dissolution, the trial court considered evidence relating to both parties' financial situations and the effect that an order requiring Jerry to bear the continued insurance coverage would have on Jerry. The trial court considered testimony relating to the parties' current situations, financially and otherwise, found that Jerry was the custodial guardian of his four grandchildren, and concluded that an order requiring Jerry to continue to bear the costs of Cathy's insurance needs would impose an unreasonable burden on him. The trial court found that the \$150.00 per week spousal payments was sufficient to meet Jerry's ongoing obligation to care for Cathy. In the light most favorable to the trial court's determination, we conclude that the evidence does not support a finding that the trial court abused its discretion in denying Cathy COBRA insurance coverage to be funded by Jerry.

³ We feel compelled to note that it is apparent that Cathy was mere days away from becoming eligible for vested health insurance benefits, provided to her by Daimler Chrysler as result of her nearly ten years of employment, when she, on her own accord, walked away from her employment at Chrysler.

IV. Inclusion of Stricken Evidence

Cathy claims that the May 10, 2006 Decree of Dissolution which was entered by Judge Menges was struck from the record by the trial court and because Jerry has not challenged the trial court's ruling on this point, it should not have been submitted before this Court on appeal. Cathy argues that the only possible reason for Jerry's inclusion of the May 10, 2006 Decree of Dissolution in his brief and appendix on appeal is to give some support or credibility to his assertion that Cathy has feigned her disability. As this order was stricken from the record, we do not consider it in our review. Cathy has not alleged any prejudice as a result of its inclusion in the record, so we find it unnecessary to consider her claim of error on this point further. *See Estate of Helms v. Helms-Hawkins*, 804 N.E.2d 1260, 1267 (Ind. Ct. App. 2004) (stating that where there is no showing that an alleged error resulted in prejudice to the substantial rights of a party, the error is harmless and there is no ground for reversal).

V. Appellate Attorney Fees

Cathy requests that we award her appellate attorney fees pursuant to Indiana Appellate Rule 66(E), which provides that this court may assess damages if an appeal is frivolous or in bad faith and that such damages are discretionary and may include attorney fees. However, our discretion to award attorney fees is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or the purpose of delay. *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). "Additionally, while Indiana Appellate Rule 66(E) provides this Court with discretionary authority to award damages on appeal, we must use extreme restraint

when exercising this power because of the potential chilling effect upon the exercise of the right to appeal.” *Id.*

We decline Cathy’s request for appellate attorney fees because the record, as evidenced above, does not support a finding that Jerry’s claims, while ultimately unsuccessful, were permeated with bad faith, frivolity, or vexatiousness. As such, the award of appellate attorneys’ fees in favor of Cathy is unwarranted.

Having concluded that the trial court did not abuse its discretion by ordering Jerry to pay \$150.00 per week in spousal maintenance to Cathy and having further concluded that the trial court did not abuse its discretion by denying Cathy’s claim for COBRA insurance as a part of her spousal maintenance, we affirm the judgment of the trial court. Likewise, having concluded that Cathy’s request for appellate attorney fees is unwarranted, we deny her request for such relief.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.